TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELY, TRUSTEE, AND RICHARD H. PAYNTER, PLAINTIFFS IN ERROR,

vs.

JOSEPH H. MOORE, EDWARD J. STELLWAGEN, AND THOMAS M. GALE, TRADING AS THOMAS MOORE AND COMPANY; MARY CECELIA THOMSON, AND GEORGIANA HAWKES THOMSON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 6, 1904.

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In the Court of Appeals of the District of Columbia.

ANDREW C. KEELY, Trustee, ET AL., Appellants,
vs.
JOSEPH H. MOORE ET AL.
No. 1243.

a Supreme Court of the District of Columbia.

ANDREW C. KEELY, Trustee, and RICHARD K. Paynter, Plaintiffs,
vs.
JOSEPH H. MOORE, EDWARD J. STELLWAGEN, and Thomas M. Gale, Trading as Thomas J. Fisher and Company.
No. 43324. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Declaration.*

Filed September 7, 1899.

In the Supreme Court of the District of Columbia.

ANDREW C. KEELY, Trustee; RICHARD K. Paynter, Plaintiffs,
vs.
JOSEPH H. MOORE, EDWARD J. STELLWAGEN, and Thomas M. Gale, Trading as Thomas J. Fisher and Company.
At Law. No. 43324.

The plaintiffs Andrew C. Keely trustee and Richard K. Paynter sue the defendants to recover the possession of the undivided ninety-one hundredths (91/100) part of all that certain piece or parcel of land and premises situate lying and being in the city of Washington District of Columbia, and being known and described as lot numbered twenty-three (23) in Samuel Davidson's subdivision of lots in square numbered one hundred and sixty-six (166), in which the plaintiffs claim an estate in fee-simple and of which they were lawfully seized and possessed to wit: on the first day of June, 1899, when the defendants entered the same and unlawfully ejected the

plaintiffs therefrom and from thence hitherto unlawfully detained and still continues to detain the same from the plaintiffs.

And the plaintiffs claim the possession of said undivided part of said real estate and premises with the appurtenances, besides the cost of this suit.

2. And the plaintiffs sue the defendants in action for rents and mesne profits; for money payable by the defendants to the
2 plaintiffs, for that the defendants, on to wit, the first day of June, 1899, unlawfully ejected the plaintiffs from the real estate described in the first part of this declaration, to wit, the undivided ninety-one one-hundredths part of lot number twenty-three (23) in Samuel Davidson's subdivision of lots in square number one hundred sixty-six (166) of which they claim an estate in fee-simple and of which they were lawfully seized and possessed on the aforesaid day, which the defendants have since said date detained and still continue to detain and unlawfully occupy, to the great damage and injury of the plaintiffs, in the sum of three thousand dollars ($3000) and the plaintiffs claim the sum of three thousand dollars besides the costs, and pray judgment accordingly.

LEO SIMMONS,
Attorney for Plaintiffs.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

LEO SIMMONS,
Attorney for Plaintiffs.

3 *Plea of Defendant Joseph Moore.*

Filed September 16, 1899.

In the Supreme Court of the District of Columbia.

ANDREW C. KEELY, Trustee, ET AL.
vs.
JOSEPH H. MOORE ET AL. } At Law. No. 43324.

For plea to the declaration filed in the above-entitled cause, and to each count thereof, the defendant Joseph H. Moore says that he is not guilty as alleged.

HAMILTON & COLBERT,
Attorneys for Defendant Joseph H. Moore.

Plea of Defendant- Edward J. Stellwagen et al.

Filed September 16, 1899.

In the Supreme Court of the District of Columbia.

ANDREW C. KEELY, Trustee, ET AL.
vs.
JOSEPH H. MOORE ET AL. } At Law. No. 43324.

For plea to the declaration filed in the above-entitled cause, and to each count thereof, the defendants Edward J. Stellwagen and Thomas M. Gale, partners trading as Thomas J. Fisher and Company, say that they are not guilty as alleged.

HAMILTON & COLBERT,
Attorneys for Defendants Stellwagen and Gale.

4 *Joinder of Issue.*

Filed September 20, 1899.

In the Supreme Court of the District of Columbia.

ANDREW C. KEELY, Trustee, ET AL., Plaintiff-,
vs.
JOSEPH H. MOORE ET AL., Defendants. } No. 43324. At Law.

The plaintiffs join issue upon the separate pleas of the defendants.

LEO SIMMONS,
Attorney for Plaintiffs.

To Hamilton & Colbert, attorney- for defendants.

Service of copy of above acknowledged this 20th day of September, 1899.

HAMILTON & COLBERT,
Attorneys for Defendants Stellwagen, Gale, and Moore.

Memorandum.

February 4, 1902.—Verdict for defendants.

5 Supreme Court of the District of Columbia.

THURSDAY, *March* 27, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

* * * * * * *

ANDREW C. KEELY, Trustee; RICHARD K. Paynter, Plaintiffs,
vs.
JOSEPH H. MOORE, EDWARD J. STELLWAGEN, and Thomas M. Gale, Trading as Thomas J. Fisher & Co.; Mary Cecilia Thomson, and Georgiana Hawkes Thomson, Defendants. } At Law. No. 43324.

Upon consideration of the motion for a new trial heretofore submitted to the court, it is ordered that said motion be and hereby is, overruled, and judgment on verdict ordered: Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendants go thereof without day and recover against the plaintiffs their costs of defense to be taxed by the clerk, and have execution thereof.

The plaintiffs note an appeal to the Court of Appeals, and the bond for costs on said appeal is fixed in the sum of $100.00.

Memorandum.

March 31, 1902.—January term prolonged 30 days to settle bill of exceptions.

6 *Memoranda.*

April 15, 1902.—Appeal bond filed.
May 9, 1902.—Bill of exceptions submitted.
May 23, 1902.—Time to file transcript extended to August 1, 1902.

Supreme Court of the District of Columbia, July 17, 1902.

ANDREW C. KEELEY ET AL., Plaintiffs,
vs.
JOSEPH H. MOORE ET AL., Defendants. } At Law. No. 43324.

Now come here again the plaintiffs by their attorneys and pray the court to sign, seal and make part of the record their bill of exceptions taken during the trial hereof, and submitted on the 9th day of May, 1902, now for then, which is accordingly done.

7 *Bill of Exceptions.*

Filed July 17, 1902.

In the Supreme Court of the District of Columbia.

ANDREW C. KEELEY ET AL.
vs.
JOSEPH H. MOORE ET AL. } Law. No. 43324.

Be it remembered, that at the trial of this cause, the plaintiff- in order to maintain the issues on their part joined, produced a certain stipulation, signed by the attorneys for the parties and gave the same in evidence, which stipulation is in words following:

"That William Thomson Jr. a citizen of the United States, died in the year of 1887, seized of the property involved in this suit, having purchased same some time prior to his death. That said William Thomson Jr. was born in the United States and always remained a citizen thereof. That he left no children or descendants of children, and was never married. That at the date of the death of said William Thomson Jr., he left no brothers or sisters. That the father of said William Thomson Jr. was also a citizen of the United States and died prior to said William Jr. That the father of said William Jr. had five brothers and three sisters, all of whom died prior to said William Jr. and without leaving any children or descendants of children, excepting a brother, David Thomson and two sisters, Ann Haig and Christina Guthrie (uncle and aunts of said William Jr.) That said Christina left one child who also died prior to said William Jr. without leaving issue. That the descendants of said David Thomson and Ann Haig, uncle and aunt of said William Jr. aforesaid, are the only living kin or blood relations of the said William Jr.

"That said David Thomson always lived in Great Britain and at his death, left two children, viz., Mary C. and Georgiana Hawkes Thomson, defendants to said suit, and no other children or descendants of children. That said Ann Haig (aunt of said William Thomson) who was a citizen of the United States, left surviving her, six children born in lawful wedlock, viz., Ann Haig, James Haig, John Haig, Elizabeth Weir, Thomas Haig and Christina Weir, all of whom were born in the United States and always remained citizens thereof; and all of whom died prior to said William Jr., excepting said Christona Weir who is now living; that of those that are deceased, all left issue born in lawful wedlock and in the United States, excepting Ann Haig the younger, who died unmarried in 1858. That the plaintiffs in this case have acquired and now hold the title of all of the descendants of the children of said Ann Haig, to the property involved in this suit, excepting nine one-hundredths undivided part thereof."

8 Thereupon it was conceded and admitted that the defendants, at the beginning of this suit, were in possession of

the property described in the declaration, claiming title under an alleged will of one William Thomson, the person named in said stipulation, and thereupon the plaintiffs rest their case.

Thereupon the attorneys for the defendants proceed to make their opening statement, and in which the following words were used:

"We expect to prove that this deed (referring to the deed under which the plaintiffs claim title) lacks any consideration; that it was the consum-ation of the whole conspiracy and there is a title in some nominal individual to act as scapegoat of these people who come here and try to force the old ladies out of their rights. It is certainly proper to show that it was made for their benefit and for"——

Whereupon the plaintiffs, through their attorney, objected to the line of argument and opening statement, and the court without sustaining said objection, stated as follows:

"Perhaps it arises upon your stipulation. It would not seem that in that paper it is stipulated not to make certain defenses or to make any defense that might be open to them consistent with the assumption on their part that the plaintiffs had the title to the property, that is, they had the title of the deceased William Thomson, Jr."

COUNSEL FOR PLAINTIFFS: "We contend that the question as to why this title was convened to the trustees is not in issue."

ATTORNEY FOR THE DEFENDANTS: "It is in issue, and it is in issue what they gave for it, it would have weight with the jury in determining the question in this case. And it seems to me while we cannot question the title, that when they conveyed it they considered it worthless."

ATTORNEY FOR THE PLAINTIFFS: "What would that prove?"

ATTORNEY FOR THE DEFENDANTS: "It would prove that for fifteen years they considered it a valid will and until somebody trumped up this matter."

ATTORNEY FOR PLAINTIFFS: "I submit that that argument
9 is not only unfounded in fact and has no reason for it; that Mr. Keeley is the son-in-law of some of these people. He is the son-in-law of one."

ATTORNEY FOR DEFENDANTS: "Who is Mr. Paynter?"

ATTORNEY FOR PLAINTIFFS: "Mr. Paynter is also a relative of the family. I submit that it has nothing to do with it and should not go before the jury."

The COURT: "You claim that they hold under the will, what would that tend to prove or disprove?"

ATTORNEY FOR DEFENDANTS: "Our friends want to prove the will invalid."

ATTORNEY FOR PLAINTIFFS: "Would that make it invalid?"

The COURT: "We hav'n't reached that stage of the case, yet while counsel mention it, it may also be noted by the jury that you contest the right of the defendants to produce any evidence of that kind. When we get to the place to offer evidence it would be the

proper time to dispose of the question whether it should be given or not."

Whereupon the defendants offered the following stipulation.

10 In the Supreme Court of the District of Columbia.

ANDREW C. KEELEY ET AL.
vs.
JOSEPH H. MOORE ET AL. } Law. No. 43324.

It is now stipulated and agreed, that the plaintiff- will not object to the manner and form of taking the deposition- of the witnesses examined on the part of the defendants, under a certain commission heretofor- issued in this court to William M. Osborne, consul general at London, England, or to its form in any way; or for any act contrary to the instructions of the court, committed by said commissioner or by any one. Provided however that this shall in no way be considered as a waiver of the plaintiffs' rights to object to the materiality of any or all of such evidence, or in any way admitting same to be competent or relevant and specifically reserving the right to object to the materiality of any and all of said evidence; that the plaintiffs do not waive the right to contend that same is incompetent, irrelevant or immaterial, and provided further that the plaintiffs shall have the right to a further commission to be issued to some person located in Southampton, England (the name of whom shall be agreed upon at some future time) to further cross-examine the witnesses Walter R. Lomer, Richard Roope Linthorne and Septimus Cooksey; and to take the depositions of such other witnesses as they may desire, provided the names of such witnesses, however, be furnished counsel, appearing herein for the defendants, a sufficient time in advance of taking *them* depositions for said counsel to arrange for and make or cause to be made such examination of any or all of the witnesses whose testimony may be taken under this stipulation as counsel may deem proper; the expense and cost of
11 same however shall be borne by the plaintiff-. And it is further agreed that *that* this case shall be passed until the April term of said court after which either side may make application for a day to be set for trial, which if not mutually agreed upon, shall not be before May 1st 1901.

LEO SIMMONS,
LAMBERT AND BAKER,
Att'ys for Defendants.

12 And thereupon the defendants to maintain the issues upon their part joined, produced as a witness, one WALTER R. LOMER, who testified by deposition as follows:

1st. What is your name, occupation and residence? My name is Walter Randall Lomer. My occupation is that of a solicitor of the supreme court of judicature in England, which occupation I carried on at 18 Portland street, Southampton in the county of Hauts,

England; and my private residence is Ashdene, Regent's Park, Southampton, as aforesaid.

2nd. What was your occupation and residence on or about the 24th day of February 1888? My occupation on the 24th day of February 1886, not in 1888 as stated in the interrogatory, which is obviously a clerical error, was that of a solicitor, which occupation I carried on at 18 Portland street, Southampton, as aforesaid. I then resided at St. Andres Lodge, Southampton, as aforesaid.

3rd. Were you acquainted with William Thomson; if so, state how long you were acquainted with him? Yes, I was acquainted with William Thomson; I knew him by repute, and by sight for several years prior to February 1886, but I only made his personal acquaintance in the month of February, 1886.

4th. Were you a witness to a will dated the 24th day of February, 1886, which is on file now in the probate, divorce, and admiralty division of the high court of justice. Yes, I was a witness to a will dated the 24th day of February, 1886, which is now on file in the probate, divorce and admiralty division of the high court of justice.

5th. Will you look at that will, which will purports to be the will of William Thomson, and state whether or not your signature appears as a witness thereto? I have looked at the said will
13 and I say that my signature does not appear as a witness.

6th. If so, state the circumstances under which you witnessed the same and who else, if anybody, was present at the time? I witnessed will at the request of said William Thomson, in his presence and in the presence of Mr. Richard Roope Linthorne, the other witness thereto.

7th. Was or was not Richard Roope Linthorne a witness to said will, and if so, state the circumstances under which he witnessed the same and whether or not the said will was witnessed in the presence of William Thomson? Mr. Richard Roope Linthorne was a witness to the said will; he was then my articled clerk and I asked him to witness the will as a second witness thereto; and he thereupon, in my presence and in the presence of said William Thompson did so.

8th. State whether or not William Thomson acknowledged the said will in your presence as his last will and testament? William Thomson acknowledged the said will in my presence as his last will and testament.

9th. State whet-er or not you signed as witness of said will in the presence of the testator? I signed as witness of said will in the presence of the testator.

10th. State whether or not Richard Roope Linthorne signed as a witness to said will in the presence of the testator? Richard Roope Linthorne signed as a witness to said will in the presence of the testator.

11th. Was or was not William Thomson, at the time of the making of said will of sound and disposing mind and capable of making a valid deed or contract? William Thomson, at the time of the

making of said will was of sound and disposing mind and capable of making a valid deed or contract.

14 & 15 12th. In whose handwriting is the original will of William Thomson and state, if you know, when and where the same was prepared? It (the will) is in the handwriting of one of my clerks, Edward Bone. The will was prepared by me at my office, 18 Portland street, Southampton, under instructions received by me from said William Thomson.

13th. Look at the certified copy which accompanied this commission and state whether or not it is a true copy of the will of William Thomson, now exhibited to you; you appearing as a witness upon said will? Said certified copy now exhibited to me, is a true copy of the will of the said William Thomson.

14th. Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yes, set forth the same fully and at large in your answer. I can add nothing to what I have already testified, but the saying that William Thomson was in every sense fully competent to make his will.

Cross-interrogatories.

1st. How long had you known William Thomson prior to the 24th day of February, 1886? I knew William Thomson by repute and by sight for several years prior to February 1886. I only made his personal acquaintance in the month of February 1886.

2nd. When and where did you meet him, upon what occasions, and who else was present at the time? He called upon me

16 & 17 at the office at 18 Portland street, Southampton on the 15th day of February 1886, upon the occasion of his instructing me to make his will. No one else was present at the time.

3rd. If you say that you witnessed a paper for William Thomson, at whose request did you do so, and how did you know the character of the paper? At Mr. Thomson's request; I knew the character of the paper because I prepared it.

4th. How many papers did you witness for said Thomson. When and at what hour in the day did you witness the papers? Two papers; being his will in duplicate; about 1.40 p. m. on the 24th day of February, 1886.

5th. Where was said Thomson when you signed same? In my office, 18 Portland street, Southampton in my presence.

6th. Did you talk with him about the contents of the paper? Yes I did, and I read the contents carefully to him and he perfectly understood the same and expressed his approval thereof, and that the same carried out his wishes.

7th. If you say the paper shown you, was witnessed by you, state whether or not you did not witness another paper at the same time? I did witness another paper, being a duplicate of the will at the same time.

8th. If you did witness another paper at the same time do you know what has become of same? The duplicate of the will, I am informed and believe, was forwar-ed to the probate court at New York, United States of America, but of this I have no personal knowledge.

9th. Was William Thomson's signature to the paper when you signed same? It was on having signed it in my presence and
18 in the presence of Mr. Richard Roope Linthorne, before we attested our signatures.

10th. If you say it was, state how you know such to be a fact? Because I saw him sign it.

11th. If you say you witnessed such paper, state how many times his signatures appeared upon same, and on what part of same? The signature appeared twice upon same; namely at the foot of the first page and at the end of the will on the second page.

12th. Was Richard Roope Linthorne present when you first met Mr. Thomson? If so, state when and where and what he was doing, or what caused him to be present. He was not in my private room on the first occasion, but was in my offices engaged on other business.

13th. Did he witness the same papers as you did? If so, state at whose request he did so, and who else was present at the time. He did, he did it at the request of Mr. William Thomson, who, as well as myself, was present at the time.

14th. Where, in what part of the house or office, when these papers were witnessed was William Thomson? Did he see you when you signed as a witness? William Thomson was in my private office; he did not see me sign as a witness.

15th. If you say that said Thomson was of sound mind, state upon what you base your opinion. I base my opinion upon the fact that having prepared many wills for clients during my professional career, extending over many years, I knew that he perfectly understood the contents of his will when read over to him by me, before he signed it.

19&20 16th. How often did you associate with him? Once a day, twice a day or once a month? I really cannot so particularly specify; I used to meet him occasionally.

17th. Did you know said Thomson was taken to an insane asylum on December 15th 1885 and confined there for a considerable time? I did not.

18th. Did you not know such was the case when you signed the paper? I did not.

19th. If you say that you did not know that he was or had been so confined to an insane asylum, assuming such to be a fact, would you still say that he was, at the time you witnessed the paper, of sound and disposing mind? Yes, I do say emphatically that at the time I witnessed his will he was of sound and disposing mind.

20th. What did he say or do at the time you signed the papers? He took his will and duplicate away with him first giving me a receipt for them, and he then stated he would attend before the

consul-general in London and obtain the requisite certificate and not trouble his vice-consul, Mr. Cooksey in the matter; but the next day he called and stated to me that he did not know when he would be in London again and therefore had seen Mr. Cooksey and arranged with him to get the certificate, and he then handed me his will in duplicate to have the form certificate engrossed thereon, which was then done, and his will in duplicate returned to him.

21st. What do you mean by the words "sound mind"? State fully? I mean that William Thomson was perfectly rational and conversed as a sane man would do and in a coherent manner.

21 & 22 2nd. If you say you know in whose hand the writing of the will is, state how you know, and how often you have seen the party write and upon what occasion? I know because the person in whose hand the writing is, was then and is still my principal clerk. I have seen him write almost daily during the past twenty-two years.

23rd. If you say that said Thomson brought said will to your office or place of business, state how many papers he had with him and what they were? He did not bring the will to me except on the occasion when he required a form of certificate to be endorsed thereon to be given Mr. Cooksey, being the day after he signed the will in duplicate, as I have before stated.

24th. Did you witness a copy of the will or the original? I say I witnessed the original will in duplicate.

25th. Do you know any of the parties to this litigation? If so, which of them, and if you say you do, state when you last saw any of them and how often you have seen them? I do not know any of the plaintiffs or the first-named defendant, but if any of the other defendants are William Thomson's first cousins, Mary C. Thomson and Georgiana Hawks Thomson, I say that I did know them but I have not seen them for years past.

26th. Are you a solicitor or a barrister? If you answer yes, state if you have been in any way retained by any of the parties to this cause? If so, how and for what purpose? I am a solicitor of the supreme court of judicature in England, and have been practicing as such for the past twenty-six years. I professionally repre-

23 & 24 sent in England the Misses Thomson referred to in my answer to the last preceding interrogatory?

27th. Is it not a fact that Mr. Thomson neither asked you, nor Linthorne to witness his will? It is not a fact; on the contrary William Thomson did request me and Mr. Linthorne *ti* witness his will in duplicate.

28th. How old are you? How old is Linthorne? I am in my forty-ninth year. Mr. Linthorne is in his thirty-eight- year.

29th. Have you ever been tried and convicted of any crime? If so, state when and where? I have not.

And thereupon the defendants to maintain the issues upon their part joined, produced as a witness, one RICHARD ROOPE LINTHORNE, who testified as follows:

1st. What is your name, occupation and residence? My name is Richard Roope Linthorne. My occupation is that of a solicitor of the supreme court of judicature in England, and I am town clerk of the county borough of Southampton in the county of Hauts, England, and my residence is Prospect Place, Hauts, Southampton, as aforesaid.

2nd. What was your occupation and residence on or about the 24th of February 1888? On the 24th of February, 1886, not in 1888 as stated in the interrogatory, that being evidently a clerical error, I was an articled clerk to Mr. Walter R. Lomer, solicitor, and my residence then was 43 Alexander road, hill, Southampton.

3rd. Were you acquainted with William Thomson; if so state how long you were acquainted with him? I was acquainted with Mr. William Thomson and first became acquainted with
25 him at the time he made his will in February, 1886, and continued so acquainted with him until the time of his death.

4th. Were you a witness to a will dated the 24th day of February 1886, which is now on file in the probate, divorce and admiralty division of the high court of justice? I was a witness to a will dated the 24th day of February, 1886, which is now on file in the probate, divorce and admiralty division of the high court of justice.

5th. Will you look at that will, which will purports to be the will of the — William Thomson, and state whether or not your signature appears as a witness thereto? I have looked at the said will, dated the 24th day of February 1886, and I say that said will, which purports to be the will of Will Thomson, bears my signature thereto as a witness.

6th. If so, state the circumstances under which you witnessed the same and who else, if anybody, was present at the time. I witnessed said will at the request of William Thomson in his presence and in the presence of Mr. Walter R. Lomer. The circumstances under which I witnessed the said will were that I was then the articled clerk of Mr. Walter R. Lomer, who called me from my room upstairs, in his offices, and introduced me to William Thomson, and the said William Thomson thereupon requested me to witness his will, which I did in the presence of himself and Mr. W. R. Lomer.

7th. Was or was not Walter R. Lomer a witness to said will, and if so, state the circumstances under which he witnessed the same and whether or not the said will was witnessed in the presence of William Thomson? Walter R. Lomer was a witness to the said will, and he witnessed the same in the presence of myself and William Thomson, at the request made to him, as well as *as*
26 myself, by the said William Thomson. Mr. W. R. Lomer prepared the will and — professionally engaged for that purpose by the testator, William Thomson.

8th. State whether or not William Thomson acknowledged the

said will in your presence as his last will and testament. William Thomson acknowledged the said will in his presence as his last will and testament.

9th. State whether or not you signed as witness of said will in the presence of the testator? I signed as witness of said will in the presence of the testator.

10th. State whether or not Walter R. Lomer signed as a witness to said will in the presence of the testator? Walter R. Lomer signed as a witness to said will in the presence of the testator.

11th. Was or was not William Thomson, at the time of the making of said will of sound and disposing mind and capable of making a valid deed of contract? In my judgment William Thomson, at the time of the making of said will was of sound and disposing mind and capable of making a valid deed of contract.

12th. In whose handwriting is the original will of William Thomson and state if you know, when and where the same was prepared? The will, which was prepared and signed in duplicate, was in the handwriting of Mr. Edward Bone, who was then the chief clerk of Mr. W. R. Lomwr, and with whom (the said Bone) I am intimately acquainted.

13th. Look at the certified copy which accompanies this commission and state whether or not it is a true copy of the will of William Thomson, now exhibited *it* to you; you appearing as a wit-
27 ness upon said will. I have looked at the certified copy, which accompanies this commission and I say that it is a true copy of the will of William Thomson.

14th. Do you know or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yes, set forth the same fully and at large in your answer? The will was prepared and signed in duplicate in the ordinary course of professional business in Mr. Walter R. Lomer's office, and the testator, Mr. William Thomson, appeared to be of perfectly sound and disposing mind.

Cross-interrogatories.

1st. Did you ever see William Thomson? If so, who told you it was he, and why was he introduced, or pointed out to you, and by whom? When was this? Yes, I did; Mr. W. R. Lomer told me it was he and introduced me to him (William Thomson) on the occasion of his (William Thomson) attending at his (W. R. Lomer's) office to sign his will, on thw 24th day of February, 1886, and for the purpose of my being witness thereto.

2nd. How did you know it was William Thomson? He was introduced to me as such by Mr. W. R. Lomer and my subsequent acquaintance with him (William Thomson) confirmed this.

3rd. Where were you on the fifteenth day of December 1885? To the best of my belief, I was at Mr. W. R. Lomer's office attending to his business.

28 4th. How long have you been employed at your present place? Since May, 1899, prior to which I was in practice in Southampton as a solicitor of the supreme court of judicature from March 1887.

5th. Where were you employed before you entered the service of Mr. W. R. Lomer? I had no previous employment, having then only recently left Liverpool college, Lancashire England, where I was educated.

6th. What did you do while in his employ? Did he ever draw a will for Mr. Thomson? If so, at whose request? While in his employ I assisted him in his practice. He did draw a *bill* for Mr. Thomson, namely, the one made in February 1886, which I witnessed. I was informed by Mr. W. R. Lomer and verily believe, it was drawn at the request of Mr. Thomson.

7th. If you say that you witnessed papers for Mr. Thomson, how many did you witness, and who was present besides yourself at the time? I witnessed two papers for Mr. Thomson, being his will in duplicate. Both Mr. Thomson and Mr. W. R. Lomer were present at the time, and no one else.

8th. Describe the appearance of Mr. Thomson, that is, his physical appearance? He was an elderly gentleman with gray hair.

9th. Describe his manner and condition of stature, shape or form. Did you know his age? If not, how old would you have taken him to be on the 20th of January 1886? He was a man of agreeable manners, of medium statu*t*re, and well proportioned. I do not know his age, but should have taken him to be between 60
29 and 70 years of age, when I was first introduced to him, which was, as I have before testified, on the 24th of February, 1886. I did not know him on the 20th of January, 1886.

10th. How far or what distance is Mr. Lomer's office from Mr. Thomson's place? What did you do while with Mr. Lomer in 1886? About half a mile distant.

11th. How did he, William Thomson, appear in general health on the 24th of February, 1886? In very good health.

12th. Who told you it was Thomson's will that you were to witness? He (Thomson) told me so himself upon his being introduced to me by Mr. W. R. Lomer in Mr. W. R. Lomer's private room.

13th. How long had Mr. Thomson been in your presence when you witnessed the paper? Only a matter of a few minutes.

14th. How do you know Mr. Thomson signed the paper? Because he signed it in my presence.

15th. Did you see him sign it? Certainly I did.

16th. Did he ask you to sign the paper? If not, who did? He did ask me to sign the paper.

17th. Did he read the paper over to you? No, he did not; it was not usual for a will to be read over in the presence of a solicitor's clerk, who is an attesting witness, as I was on this attestation.

18th. How many papers did you sign for him? I signed two papers, being his will in duplicate, because he told me so at the time of my signing it.

30 19th. If you say that William Thomson was of sound and disposing mind, state how you know, and for what reason you took him to be so. From my personal observation of him and his intelligent conversation.

20th. Would you take a man to be of sound and disposing mind at Mr. Thomson's age, taking into consideration the fact that he had been confined in an insane asylum only a few days prior to the time of the alleged execution of this paper? From my knowledge and experience, most men in England are certainly capable of making valid wills between the ages of 60 and 70. I have no knowledge of Mr. Thomson having been confined neither do I believe that he had been confined in an insane asylum only a few days prior to the time of the execution by him of — will, and even had he been, the fact that he had been discharged as cured, is sufficient evidence of his sanity at the time which is more than confirmed by my general observations of, and conversation with him, on the 24th of February, 1886.

21st. At the time you witnessed these papers, did you know that Mr. Thomson had been placed in an insane asylum on the 15th day of December, 1885? I did not.

22nd. Assuming that he had been confined, what would you then say about his sanity? In answer to this cross-interrogatory I say the same as I have already said in reply to the twentieth interrogatory.

23rd. Is it not a fact that you never saw William Thomson write? If you say no, state how often and what he was writing about, and how you came to know it. It is not a fact that I never saw William Thomson write, on the contrary I saw him write, namely,
31 when he signed his will in duplicate on the 24th of February, 1886, in my presence and in that of the subscribing witness, Mr. W. R. Lomer. I never saw him write but on that occasion.

25th. Have you ever been tried and convicted of any crime. If so, state where and when? Certainly not.

32 And thereupon the defendants to maintain the issues upon their part joined, produced as a witness one SEPTIMUS COOKSEY, who testified by deposition to the following effect:

Q. What is your name and present residence? A. My name is Septimus Cooksey and my present residence is Wyntersead, Archers road, Southampton, Hampshire, England.

Q. Are you a son of the late John Henry Cooksey, formerly of the county and borough of Southampton, who was formerly vice-consul, at Southampton, of the United States of America. A. Yes, I am.

Q. Please state the date of the death of John Henry Cooksey. A. March 10th, 1895.

Q. Was John Henry Cooksey vice-consul as aforesaid upon the 25th day of February 1886. A. He was.

Q. If so, was the late William Thomson consul at Southampton in February 1886, when your father was vice-consul? A. Yes, he was.

Q. Have you frequently seen your late father write and subscribe his name to documents, and if so, did you become, and are you, thoroughly acquainted with the manner and character of his handwriting and subscriptions. A. I did frequently see my late father write and subscribe his name to documents, which I had many opportunities of doing, being his partner in business, which made me thoroughly acquainted with the manner and character of his handwriting and subscriptions.

Q. Did you on the 16th of May 1900, attend at the principal registry of the probate division of the high court of justice in England, and having produced to you there the original will of said William Thomson, deceased, dated the 24th day of February 1886,
33 then and there examine particularly the certificate written in the margin of the second and last page of said will, which certificate purports to be signed by your late father, and then and there identify said signature as having been made in the handwriting of your father, John Henry Cooksey? A. Yes, I did.

Q. Having now exhibited to you the above-mentioned original will of the late William Thomson and now looking at the certificate written in the margin of the second and last page of the said will, which certificate purports to have been signed by your late father, John Henry Cooksey, will you state in whose handwriting said signature appears? A. I am positive that the signature to such certificate is in the handwriting of my late father.

Q. Will you look at photograph marked J. D. V. No. 1, and appended to this commission, and state who wrote and signed said statement set out in photograph? A. I say without hesitation that the signature "John H. Cooksey," is the signature of my late father.

Q. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yes, set forth the same fully and at large in your answer.

And thereupon the attorneys for the plaintiffs objected to the reading of the following answer to the final interrogatory, upon the grounds that the question is not responsive to any question asked the witness, and by reason thereof the plaintiff could not have an opportunity to cross-examine him upon said answer, which objection the court overruled, and the plaintiffs excepted.

A. I have nothing to add to what I have already testified except that I recollect the occasion in the month of February, 1886, when Mr. Thomson came in to see my father about his will, but
34 the exact date of which I cannot, after this lapse of time recall, and I say at that time so far as I could judge Mr. Thomson was perfectly sane and in good health.

Thereupon the plaintiffs moved to strike out the answer last named; which motion the court overruled, and the plaintiffs thereupon excepted.

Cross-examination of said witness:

Q. Where were you December 1st 1885? A. I cannot say after this elapse of time, not having kept a diary, but to the best of my belief, I was in Southampton attending to my business in the ordinary way.

Q. Where were you on the first of November 1885? A. I answer this cross-interrogatory in the same way as I answered the last preceeding cross-interrogatory.

Q. If you say you were at Southampton, state what you were doing there and what business you were engaged in at that time? A. I was engaged in the business of my partnership with my father, which business was that of wines, spirits and provision merchants.

Q. How old are you? A. In my fortieth year.

Q. How often did you see John H. Cooksey write? A. Almost daily for years.

Q. How often did you see him write during the last ten years of his life? A. Almost daily.

Q. How do you know that the signature to the certificate to the alleged will, is the signature of your father, John H. Cooksey? A. Being thoroughly well acquainted with his handwriting and having carefully examined such signature I am perfectly sure of it.

35 Q. At whose request did you attend before the registry of the probate division of the high court of justice in England on May 16th 1900? A. At Mr. W. R. Lomer's request.

Q. Were you paid for your services. If so, what amount and by whom? A. No I was not actually paid for my services, but I received from Mr. W. R. Lomer the sum of three guineas as some compensation for my loss of time from business, and I received from him a further sum of one and a half guineas for my traveling expenses.

Q. Did you know William Thomson, the party who it is claimed made the will in question. A. I knew him very well as he often came to see my father on consular and other business, Mr. Thomson then being consul and my father being vice-consul. My father's place of business was very near to the office of the United States consul at Southampton.

Q. If so, when did you first see him. Where and how often did you see him. A. After this great elapse of time I really cannot recall the first time I saw Mr. Thomson. I saw him very frequently in the town of Southampton, but in my father's office and elsewhere.

Q. Is it not possible that the alleged signature of your father to said will may be that of some one else. A. Not at all; I am absolutely certain that it is my father's signature.

Q. Is the whole certificate in his handwriting. A. No, it is not. Only my father's signature to the certificate, and his official title, namely, "vice-consul of the United States of America," are in his handwriting. I am informed by Mr. Lomer, and verily believe that the certificate (with the exception of the words "25th" written

I am informed and verily believe by Mr. Thomson himself)
36 is in the handwriting of his (Mr. Lomer's) chief clerk, Edward Bone.

Q. Are you quite sure the signature is that of John H. Cooksey? A. Yes, I am positive it is.

And thereupon the defendants to further maintain the issues upon their part joined, produced as a witness one ROBERT ALBION PRITCHARD, who testified by deposition to the following —:

The plaintiffs having objected seperately to each of the questions propounded to said witness, having made said objections of record at the time said interrogatories were sent out by the commission. And again renewed their objections to said questions and answers seperately thereto before the court at the trial upon the grounds that the same was irrelevant and incompetant, but said objections were overruled; and thereupon the plaintiffs excepted to the allowance of each question and answer seperately.

Q. State your name, occupation and place of residence. A. My name is Robert Albion Pritchard (not Robea Pritchard as incorrectly described in the commission). I am a barrister-at-law and one of the registers of the probate, divorce and admiralty division of the high court of justice of this country. I am also a doctor of civil law and my official residence is at the probate registry, Somerset house, Strand London England.

Q. State the duties of your office and whether or not you have knowledge of the records of your office and the original papers contained therein. A. The duties of my office are to examine, certify and sign wills as one of the registers of the probate division of the high court of justice, and attend to matters incident *thereto*
37 and as a result of these duties I have knowledge of the records of my office and of the original papers contained therein.

Q. State whether or not there is a paper there purporting to be the last will and testament of William Thomson. A. Yes, there is.

Q. State whether the last will and testament has been probated in the probate divorce and admiralty division of the high court of justice and whether the same is of record. A. Yes, the last will and testament has been probated in the probate, divorce and admiralty division of the high court of justice, and the same is of record.

Q. State whether or not there is any other certificate on the second and last page of said original will and if so, state what said certificate contains. A. There is on the last page of the original will a certificate, a true copy of which is photographed and annexed to the declaration of the notarial certificate of Mr. Venn which is now produced to me. There is no other certificate on the said will but the attestation clause. That certificate is in the following words:

"I hereby certify that William Thomson, consul at Southampton for the United States of America, attended before me this 25th day

of February, 1886, and acknowledged the foregoing paper-writing contained in two sheets of paper as the last will and testament, and that the signature William Thomson at the foot thereto, is in the proper handwriting of the said William Thomson.

JOHN H. COOKSEY,
Vice-consul of the United States of America."

Q. Will you look at the paper marked J. D. V. S. purporting to be a photograph of certificate of John Henry Cooksey vice-consul of the United States and state whether the original appears attached to said will, and if so, exactly how the same appears. A. I have
38 looked at a paper marked "J. D. V. 1" (not J. D. V. 3, as stated in this interrogatory) purporting to be a photograph of certificate of John Henry Cooksey, vice-consul of the United States, and I say that the original of such photograph appears written on the second, which is the last page of the original will executed by William Thomson and bearing the date February 25th 1886 and which will was made by William Thomson and attested by Walter R. Lomer, solicitor Southampton, Hampshire, England, and Richard Roope Linthorne, his articled clerk, and I say that the original does appear exactly as is described on said Exhibit "J. D. V. 1."

Q. Will you look at paper marked "J. D. V. 2" attached to these interrogatories which paper purports to be a certified copy of the last will and testament of William Thomson and state what said paper is. A. I have looked at the paper marked "J. D. V. 2," which is attached to these interrogatories and I say that the paper is what it purports to be, namely, a certified copy of the last will and testament of William Thomson.

Q. State whether you have compared said paper with the original will of said William Thomson and if so, when. A. Yes, I have compared said paper with the original will of said William Thomson. I compared it with the said original will, on the 15th day of January of this year, 1901, and I say it is correct, word for word, in every particular, of said original will.

Q. Do you know, or can you set forth, any other matter of thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If so, set forth the same fully and at large in your answer. A. No; I know of nothing in addition to what I have already testified, except that the original will of the said William Thomson has been
39 duly proved in form of law and the probate of it would be accepted as evidence of a will in all courts of justice on this county.

And thereupon the defendants to further maintain the issues upon their part joined, produced as a witness one WILLIAM GEE PARKER, who testified by deposition to the following effect:

The plaintiffs having objected seperately to each of the questions propounding to said witness, having made said objections of record

at the time said interrogatories were sent out by commission, and again renewed their objections to said questions and answers seperet-ly thereto before the court at the trial, upon the grounds that the same were irrevelent, incompetent, and immaterial, but said objections were overruled and thereupon the plaintiffs excepted to the allowance of each question and answer separately.

Q. State your name, occupation and residence. A. My name is William Gee Parker, my occupation is that of a photographer and my business residence is at number 288 High Holborn in the county of London, England.

Q. State what, if anything, you know of the will of William Thomson, and whether at any time you photographed a paper, or a part of a paper, purporting to be a certificate on said will. A. Yes, I know of the will of William Thomson and I say that I was called upon in the course of my business to make a photograph of the paper or part of a paper purporting to be a certificate on the said will.

Q. Fully set out all of the circumstances of making said photograph. A. I recollect that the will in question was brought here where my examination is now being taken, namely 288 High Holborn in the county of London, England, by the gentleman
40 from the probate registry of the high court of justice, Somerset house, Strand, in the county of London, a copy of which I have in my day book. The name of the gentleman I cannot recall. It was brought here, so far as I can remember, for the purpose of having a fac-simile made of a certificate which appeared on that will, and I know that I personally made the photograph of the said certificate, and whilst the said will with the certificate thereon was in my studio, I can remember quite well that it did not go out of my sight, and after this certificate had been photographed by me, the will with certificate thereon was handed back by me to the official who brought it to my studio from the probate registry of the high court of justice, Somerset house. Upon reference to my day book I find that the photograph in question was made by me on the 23rd of April 1900.

Q. Will you look at the photograph annexed to these interrogatories marked "J. D. V. 1" and state what the same is. A. I have looked at the photograph annexed to the interrogatories marked "J. D. V. 1" and I say that the said photograph marked "J. D. V. 1" is a fac-simile copy of the certificate as it appears on the original will in question, which fac-simile copy was made by me.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause. If yes, set forth the same fully and at large in your answer. A. I
41 do not know that I have anything further to add, except that I recall the fact that Mr. John Venn, a notary public of the city of London, accompanied the officer of the registry of the high court of justice, Somerset house, (whose name I cannot now

recall) and that in his presence and in the presence of Mr. Venn, I made a photograph of the certificate that appeared on the will. The original photograph is the same as is annexed to the notarial certificate of Mr. Venn, now produced to me by the commissioner and marked "J. D. V. 1;" the negative of this photograph is in my possession and has never left my possession it being the practice of my firm to keep all negatives for some years. As a matter of fact all negatives or photographs taken by my firm are kept for at least ten years, except when negatives or photographs are especially asked for by the parties for whom the negatives have been taken which is of very rare occur-ance.

And thereupon the defendants to further maintain the issues upon their part joined, produced as a witness one JOHN DALTON VENN who testified by deposition to the following effect:

The plaintiffs having objected seperately to each of the questions propounded to said witness, having made said objections of record at the time said interrogatories were sent out by commission, and again renewed their objections to said questions and answers seperately thereto before the court at the trial, upon the grounds that the same were irrevelent, incompetant and immaterial, but said objections were overrnled and thereupon the plaintiffs excepted to the allowance of each question and answer seperately.

Q. State your name, business and residence. A. My name is John Dalton Venn. I am a notary public and my business
42 residence is at 50 Gresham house, Old Broad street, in the city of London, England.

Q. State what, if anything, you know about the photographing of the will or a part thereof, or certificate thereto of William Thomson. A. I was present on the 23rd day of April 1900, at Messrs. Parker and Company's place of business at 288 High Holborn in the county of London, England, photographers, and saw a certificate in the margin of the original will of William Thomson photographed by Mr. W. Gee Parker.

Q. If the same was photographed or any part thereof photographed, state when and where and by whom and whether the same was done in your presence. A. I have already answered this interrogatory in my reply to the last preceeding interrogatory.

Q. Will you look at the photograph annexed to these interrogatories and marked "J. D. V. 1" and state what the same is? A. I have looked at the photograph annexed to this interrogatory marked "J. D. V. 1" and I say that it is the photograph taken in my presence by Mr. W. Gee Parker, and to which I have already referred.

Q. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yes, set forth the same fully and at large in your answer. A. I refer to my notorial certificate marked "Exhibit A" which is annexed to

these interrogatories, which was granted by me on the 23rd day of April 1900 and under my notorial seal and signature which sets out all that I know in connection with the photograph and the
43 will of the said William Thomson; and also the certificate in the margin of the said will, and I confirm same in every particular.

And thereupon the defendants to further maintain the issues upon their part joined, produced as a witness one WALTER MAXWELL LYTE who testified by deposition, to the following effect:

The plaintiffs having objected seperately to each of the questions propounded to said witness, having made said objections of record at the time said interrogatories were sent out by commission, and again renewed their objections to said questions and answers seperately thereto before the court at the trial, upon the grounds that the same was irrevelent and incompetant, but said objections were overruled and thereupon the plaintiffs excepted to the allowance of each question and answer seperately.

Q. State your name, occupation and residence. A. My name is Walter Maxwell Lyte (not Lyle as incorrectly described in the commission); I am by occupation a curl servant, employed as a clerk in the probate registry, Somerset house, Strand, in the county of London, England; and my official residence is in the said probate registry, Somerset house.

Q. State the duties of your office. A. The proving, registering, and giving safe custody to wills and granting letters of administration.

Q. State whether or not in your office, you have a paper probated as the last will and testament of William Thomson bearing the date of February 25th, 1886. A. Yes, I have.

44 Q. State whether or not the same or any part thereof or any certificate thereto, was photographed; if so, state when and where, under what circumstances, and in whose presence? A. Yes, acting on instructions from the record keeper of the probate registry, I took the aforesaid original will at 12 o'clock, noon, on Monday the 23rd of April 1900 to Messrs. Parker, photographers, 288 High Holborn, London, England. I went into the studio there. The photographer, Mr. Parker an elderly gentleman, his assistant Mr. Jupp, a solicitor of 48 Lime street in the city of London, another gentleman, who I understood to be a notary public of the city of London and myself were present. The photographer was requested in my presence by Mr. Jupp to photograph the certificate in the margin of the second and last sheet of said will, including pencil writings, namely the words "omit" and the words "not to be reg'd." The said second sheet was pinned to a board. In the first instance an exposure was given with electric and daylight combined. I was asked to wait a few minutes for the result. I did so and was informed by the photographer that over-exposure had been made; I was informed a few minutes later by the photog-

rapher that a good result had been obtained. No further exposures were made. I then took the will back to the probate registry, Somerset house. The will did not leave my sight for a single instant the whole time.

Q. Will you look at the photograph marked "J. D. V. 1" and state what the same is and the circumstances under which it was made. A. I have looked at the photograph marked "J. D. V. 1" and have examined it carefully with the original certificate
45 and pencil writing on the said will. The photographed certificate is word for word the same as that of the original will including the signature of "John H. Cooksey" "vice-consul of the United States of America." The photograph is printed on — which is to- short, and include- the combination of the pencil line on the extreme right edge beyond the letter "l" of the word consul. There is nothing else in the margin of the original will with the exception of two pencil ticks, a small "6" and a small "2" written in pencil also beyond the right edge of the photograph. The part of the signature of John D. Venn, namely, "D. Venn" on the top right hand corner of the photograph and part of the letter "V" of the name "Venn," and the letters "enn" the remainder of the name "Venn" on the bottom of the left edge of the photograph; do not appear in the aforesaid margin of the second and last sheets of the original will which was photographed in my presence.

Q. Do you know or can you state, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause. If yes, set forth the same fully and at large in your answer. A. I have nothing to add.

46 And thereupon the defendants offered to read as part of their evidence, to the jury, the following paper, marked "J. D. V. 3," to which the plaintiffs, through their attorney, objected; said objection was overruled and the plaintiffs excepted.

"J. D. V. 3."

Exhibit from the Principal Registry of the Probate Divorce and Admiralty Division of the High Court of Justice.

The following is a copy of a certificate written on the second page of the original will of Wm. Thomson, deceased, proved in this registry the 25th day of January, 1887, but which forms no part of the probate thereof.

"I hereby certify that Wm. Thomson, consulate at Southampton, for the United States of America, attended before me this 25th day of February, 1886, and acknowledged the foregoing paper-writing contained in two sheets of paper as his last will and testament, and that the signature 'Wm. Thomson' at the foot thereof is in the proper handwriting of the said Wm. Thomson.

[L. S.] JNO. H. COOKSEY,
Vice-consul, United States of America."

I certify that this copy has been examined with the original certificate deposited in this registry and that it is a true copy thereof.
(Signed) A. MUSGRAVE, *Registrar.*

47 At the execution of the commission for the examination of witnesses between Andrew C. Keeley *et al. vs.* Jos. H. Moore *et al.* This Exhibit No. J. D. V. 3, and hereto annexed, was produced and shown to J. D. Venn, and by him deposed unto and subscribed by him at the time of his examination above.

WM. M. OSBORNE,
Commissioner.
JNO. D. VENN, *Witness.*

And thereupon the defendants offered to read in evidence the following paper, purporting to be a copy of the will of Wm. Thomson, Jr. late United States consul, at Southampton, England.

This is the last will and testament of me, William Thomson, late of Washington city, in the United States of America, but at present of No. 24 Cumberland place, in the town and county of Southampton, England, consul at Southampton aforesaid, for the United States of America.

I hereby revoke all former wills and testamentary dispositions made by me. I direct all my past debts and funeral and testamentary expenses to be paid as soon as conveniently may be after my decease. I appoint James E. Cunningham, of No. 4 Arthur street, West London bridge, in the city of London, merchant, George Scott, of No. 4 Lower Prospect place, in said town and county of the town of Southampton, doctor of medicine, Samuel Gresine Thompson of No. 1630 Spruce street, Philadelphia, Pennsylvania, in said United States of America, attorney-at-law, and Simon Pardessus of No. 10 College place New York, in said United States of America (hereinafter called my trustees) to be the
48 executors and trustees of my will. I bequeath all my wearing apparel to William Thomson Weir, the elder, of No. 2010 North Eighth street, Philadelphia, aforesaid, and Thomas Haig, of No. 926 North Fourth street, Philadelphia, aforesaid, equally between them. I bequeath my Columbian *nonds* to Maria Guthrie, of No. 63 South Clerk street, Edinboro, Scotland, spinster. I devise my house and premises situate on Seventeeth street, Washington, aforesaid, unto Mary Cecelia Thomson, and Georgiana Hawkes Thomson, both of No. 3 Coptall Villas, Folkesbone in the county of Kent, England, spinsters, for their joint lives and to the survivor of them for her life, and from and after the decease of the survivor of them the said Mary Cecelia Thomson and Georgiana Hawkes Thomson, then I devise the said house and premises unto Mary Cunningham Roberts (wife of Coryton Roberts, of Ceylon, coffee planter) of No. 4 Arthur street, West London bridge, aforesaid, for her life and from and after the decease of said Mary Roberts then I devise the said house and premises unto her only son now aged ten

years or thereabouts, absolutely. I devise my house and premises situate at the corner of Sixth avenue and Thirteenth street, New York, aforesaid, and bequeath all my bonds or securities which are now or at time of my death may be in possession of said Samuel Gresine Thomson, for the safe custody thereof, my oil paintings, purporting to be portraits of Columbus and his sons and my furniture, plate, glass, linen, china, books, pictures, prints, wines, liquors and other household effects unto my trustees upon trust that my trustees shall sell and convert into money the same, and shall divide the moneys to arise from such sale and conversion, after deducting thereout the costs, charges and expenses of and incident to such sale amongst the persons in
49 the proportions following, that is to say, as to the net proceeds of sale of my said house and premises at New York two-fourths part thereof to the said William Thomson Weir, one three-fourths part thereof to the said Thomas Haig and the remaining fourth part thereof to Elizabeth Cunningham of No. 4 Arthur street, west London bridge aforesaid, widow. As to the net proceeds of sale of my said bonds and securities one-eighth part thereof to the said Maria Guthrie and the remaining seven-eighths part thereof to such of the daughters of the said James E. Cunningham as shall attain the age of twenty-one years or marry under that age in equal shares. As to the proceeds of the sale of my said oil paintings one-half part thereof to the said James E. Cunningham and the other one-half part thereof to Janet Thomson Welsh, wife of Alexander Welsh, of Waughton Preston Kirk, East Lothian, Scotland, and as to the proceeds of sale of my said furniture and household effects one-fourth part thereof to the said Maria Guthrie, one-fourth part to said Maria Cecelia Thomson, one-fourth part to the said Georgiana Hawkes Thomson, and the remaining one-fourth part to the said Mary Cunningham Roberts. I devise and bequeath all my real and personal estate not hereby otherwise disposed of to the same persons and in the like shares as I have lastly hereinbefore bequeathed the proceeds of sale of my said furniture and household effects.

In witness whereof I, the said William Thomson, have to this my last will and testament contained in two sheets of paper, and to each sheet thereof, set my hand this 24th day of February, 1886.

WILLIAM THOMSON.

50 Signed and acknowledged by the said William Thomson, the testator as and for his last will and testament in the presence of us, both being present at the same time, who at his request in his presence, and in the presence of each other have hereunto subscribed our names as witnesses.

WALTER R. LOMER,
Solicitor, Southampton, Eng.
R. ROUPE LINTHORNE,
His Articled Clerk.

On 25th day of January, 1887, probate of this will was granted to James Elliott Cunningham one of the executors.

I certify that on the 16th day of August, 1887, the above written copy of will was examined with the original will deposited in this registry and that it is a true copy thereof.

J. C. HANNEW, *Register.*

(The following is a copy of the certificate attached to the margin of the will.)

I hereby certify that William Thomson, consul at Southampton for the United States of America, attended before me this 25th day of February 1886 and acknowledged the foregoing paper-writing contained in two sheets of paper as his last will and testament and that the signature "Wm. Thomson" at the foot thereof is in the proper handwriting of the said William Thomson.

[SEAL U. S. CONSUL.] JOHN H. COOKSEY,
Vice-consul United States of America.

51 To the introduction of which papers the plaintiffs, through their attorneys, objected upon the following grounds:

"First, because the paper offered is not properly certified as required by law to entitle it to admission in evidence. And is not properly proven to be a copy of the original paper, and is not proper and competent evidence to prove a will of real estate. That the original will should be produced. That the alleged will had not been proven to be a will executed in accordance with the law of the District of Columbia so as to admit it as evidence of a will of real estate, for want of proper attestation. Upon the grounds that the evidence of the witness to the alleged will discloses the fact that if such will ever existed it had been executed in duplicate, and that the duplicate of such will should be produced. Upon further grounds that it appeared from the evidence of the witness to said alleged will, that it was not the paper shown to have been signed by said Thomson; the one purporting to have been signed by him, according to the evidence, having been signed and executed by the alleged testator at the foot of each page thereof, while the copy of the papers produced showed the want of the signature on the first page. Upon the grounds that the testator at the time the paper is alleged to have been executed, was of unsound mind. Upon the grounds that the alleged paper, if such was a will, was obtained by undue influence, * * * by James E. Cunningham, or some other person."

Thereopon the court overruled each and all of said objections and admitted said paper in evidence and allowed same to be read to the jury. To each and all of said rulings the plaintiffs excepted,
52 and the defendants offered no other or further evidence in relation to said alleged will, or the execution thereof and thereupon announced their case closed.

And thereupon the plaintiff offered as a witness in rebuttal, ANNIE LOWMAN who testified by deposition, as follows:

1. Where do you live? I live at No. 85 Park street, Freemantle in the borough and county of Southampton, Hampshire, England.

2. Did you know William Thomson, late United States consul at Southampton, England. I knew William Thomson, late United States consul at Southampton, England.

3. If you say you were employed by William Thomson; state when you were so employed and how long you remained with him. I was employed by William Thomson as housekeeper from about the year 1882 until the year 1886, about three and one-half years as far as I can remember.

4. Were you in his employ in December 1885? Yes, I was in his employ in December 1885.

5. What happened to Mr. Thomson in the month of December 1885? Mr. Thomson was in the month of December 1885, taken to the asylum.

6. If you say he was taken to the *any* asylum; state what asylum it was and why he was taken there. He was taken to Laverstock House asylum at Salsbury in the county of Wiltshire because he was insane.

7. Did he appear to be sane or insane when he was taken away? He appeared to be insane when he was taken away.

8. What did he do to make you think he was insane? He
53 stuffed paper and straw inside his clothes and asked me and my mother (who was staying there to protect me) to set him on fire. He several times tried to jump out of windows, and all windows had to be shut up, barred and secured. He threatened to take my life, he talked all sort of nonsense, he wrote letters without meaning to several persons and in order to quiet him on several occasions I made up a fur rug and put it in his bed and told him it was a baby. He would mix up food and drink together and eat with his hands and behaved generally like a mad man.

9. How long did he remain confined in the asylum? He went into the asylum about the 16th of December 1885, and returned home about the 1st of February 1886.

10. Who came to his house, while he was so confined, and how often? A Miss Thomson (I cannot say which) called some time before he went to the asylum, but called only once and only stayed a short time.

11. Did you ever see Miss Georgianna H. or Mary C. Thomson at his house? I saw a Miss Thomson at his house only once, but cannot say whether she was Miss Georgianna or Miss Mary C. Thomson.

12. When Mr. Thomson returned from the asylum who was with him? When Mr. Thomson returned from the asylum there was with him a keeper and a doctor.

13. How long did you remain with him after he returned? I left Mr. Thomson's service some time in March 1886.

14. What were your duties or in what way were you engaged about the Thomson house? I was the housekeeper and managed the housework.

54 15. When and why did you leave him?

On objection, by defendants that part of the following answer

inclosed in brackets was stricken out and the plaintiffs by their counsel excepted.

I left some time in March, 1886, because (Dr. Scott his medical man said) it was not safe for me to stay there.

16. How often did you see him? I saw Mr. Thomson (while he was at home) daily and several times a day. I waited upon him.

17. What act of violence did he attempt or commit immediately after his return?

And the defendants objected to the following answer, which objection the court sustained, to so much thereof as is enclosed in brackets, and thereupon the plaintiffs excepted.

Mr. Thomson went away for a holiday soon after he returned from the asylum and in the interval I saw very little of him (as my mother would not let me go near him.) I saw no act of violence before he went away for his holiday.

18. Did he act as he had acted prior to his being taken to the asylum? I cannot say, as I then saw very little of him, but from what I did see I thought he was just as insane as before he went to the asylum, if not worse.

19. What was the last time you saw him? The last time I saw him was about April, 1886.

20. Was he then in the same condition he was before he was taken away? What did he say? He seemed very strange and imagined there was some silver missing. I told him I would probably find it and that seemed to satisfy him.

21. Who took your place as housekeeper? I do not know who took my place as housekeeper. It was an old lady but I do not know the name.

22. State who sent her there if you can. I do not know who sent her there unless it was Mr. Cunningham who seemed to be looking after Mr. Thomson's affairs.

23. After Mr. Thomson returned from the asylum, was he easily persuaded to do things [or act? Yes, more so than before he went away.

24. Do you think any person could have cheated him or taken advantage of him after his return from the asylum? Yes I certainly think that any person could have cheated him or taken advantage of him after his return from the asylum.

25. Did you ever see Elizabeth Cunningham at Mr. Thomson's house? I saw Mrs. Cunningham at Mr. Thompson's house to call, but I do not know if she ever slept in the house.

26. Did you ever see her with Mr. Thomson or hear him speak of her? I never saw Mrs. Cunningham with Mr. Thomson and never heard him speak of her.

27. Did you ever see Janet Thomson at Mr. Thomson's house or in his company? Did you ever hear him speak of her? Janet Thompson Welch may have been there but I do not know her. A great many people who I did not know called after Mr. Thomson returned from the asylum.

28. Did you ever see Mary Guthrie at his house? Did you ever see him in her company? Did you ever hear him speak of her? The last answer also applied to Mary Guthrie.

29. What did you hear or notice in relation to James E. Cunningham? James E. Cunningham was not much at Mr. Thomson's house until after his return from the asylum. After that he spent most of the day there, sleeping elsewhere at night. I cannot
56 say how long Mr. Cunningham stayed in Southampton at that time or when he went back home to London.

30. Did you ever see Mr. Cunningham at Mr. Thomson's house or in his company before his illness? Yes, he called before Mr. Thomson went to the asylum, gave his consent to his going and took an inventory of articles in the house after Mr. Thomson left.

31. Did you ever hear Mr. Thomson speak of him? I never heard Mr. Thomson speak of him.

32. State fully all of Mr. Cunningham's actions before and after Mr. Thomson returned from the asylum. It is so long ago that I could not say with certainty.

33. Do you know or can you state any other thing or circumstance that would be of interest or material to the parties to this suit? No.

Whereupon the plaintiff produced as a witness in rebuttal one FRED E. HISCOCK, who testified by deposition to the following effect:

1. What is your name? Fred E. Hiscock.

2. Where did you live in the years of 1885 and 1886? Southampton.

3. Did you know William Thomson, late United States consul at Southampton, England? Yes.

4. In what way were you employed? Clerk in the United States consulate.

5. How long had you been and how long — you continued so employed? About six years.

6. State what happened, if anything, to said William
57 Thomson in December 1885. About that time he became insane.

7. If you say he was taken to any institution, state what and where it was. To Laverstock.

8. When was he taken to said institution and for what purpose? About that month he became very violent and was taken there for treatment.

9. Was he sane or insane when he was taken to asylum? Insane.

10. State what he did or said to indicate his condition of mind. He tried to break up his furniture and spoke of things that were impossible to occur.

11. What act of violence did he commit? Throwing his furniture about.

12. Did you visit him while in the asylum? I do not remember.
13. If so, state what time it was, as near as you can and who if any one accompanied you. I do not remember.
14. Did you notice any act of said Thomson, while at the asylum that would indicate his condition of mind? I do not remember.
15. Did he return from the asylum to his home again. If so, state when and who was with him at the time. Cannot remember exact date, but with two men as guards.
16. Was his mind in as good condition, when he returned as it was before he was taken ill? No.
58 17. What did he do within a few days after his return, that was unusual? He would ask me the same questions over and over again.
18. What did he do in the first month after his return that would indicate his condition? He changed his ideas in all of his transactions.
19. What did he do within the space of two months after his return that showed his changed condition? He changed his will.
20. Was he ever in his normal condition again; that is to say did he ever appear to you to be in the same condition of health mentally or physically that he was before he was taken ill to the asylum? No.
21. Do you know Annie Barter, now Mrs. Lowman? Yes.
22. In what way, if any, was she employed at the Thomson house? As housekeeper.
23. Did you ever see James E. Cunningham, now deceased who visited Mr. Thomson during his illness? Yes.
24. How often did you see him before Mr. Thomson was taken ill? Once.
25. How often after he was taken ill? Not until after Mr. Thomson's death.
26. State what act of authority said Cunningham did. After the death of Mr. Thomson he took charge of everything.
59 27. Was Mr. Thomson easily influenced after his return from the asylum? I think he was.
28th. If you know of any incident of the kind state what it was. I do not remember.
29. Did you often accompany Mr. Thomson when he would go out after his illness? Yes.
30. Why did Annie Barter leave the service of Mr. Thomson? She did not like to stop in the house with him.
31. Did Mr. Cunningham want you to leave also? I cannot say, but Mr. Thomson did not.
32. Who took Annie Barter's place? An old lady from London, cannot remember name.
33. If any person did, state at whose instance or request it was. By recommendation from Mr. Cunningham's family in London.
34. Who had charge of Mr. Thomson's affairs after he was sick?

On objection by the defendants, the following answer was stricken out to which ruling the plaintiffs excepted:

I telegraphed to the old lady Thomson against Mr. Thomson's wishes, saying that thw wolves will be here in time.

35. If you say James E. Cunningham had, state how long he continued to exercise such authority. Cannot tell how long.

36. Who attended to Mr. Thomson's legal affairs, what lawyer or barrister? Mr. Lomers or Lowners, I do not know exactly which.

37. Did you ever see Elizabeth Cunningham at Mr. Thom-
60 son's house? No.

38. Did you ever see her with Mr. Thomson or hear him speak of her? No.

39. Did you ever see Janet Thomson Welch at Mr. Thomson's house or in his company? No.

40. Did you ever hear him speak of her? No.

41. Did you ever see Mary Guthrie at his house? Did you ever see him in her company? Did you ever hear him speak of her? No.

42. State fully all of Mr. Cunningham's actions before and after Mr. Thomson's return from the asylum. He took charge of all of the affairs after Mr. Thomson's death.

Do you know or can you state any other thing or circumstances that would be of interest or material to the parties to this suit. I do not.

There*fore* the plaintiffs to further maintain the issue upon their part joined, produced as a witness in rebuttal one WM. A. P. LANE, a practicing solicitor and member of the high court of justice of England. Who testified to the following effect:

That he was very familiar with the laws in relation to the execution of wills in England, and that by an act known as the Wills act, passed July 3rd. 1837, only two witnesses were required in
61 order to attest a valid will of real estate, and thereupon said witness, after having identified a volume containing the British statutes, read from said volume the act referred to, 1st Victoria, chap. 26, sec. 9, as follows:

"And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made, or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witness shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Said witness further testified that such was the law governing the execution of wills in England in the years 1885 and 1886. That the same remains in force.

Thereupon the plaintiffs asked the witness the following questions:

Q. Now will you tell us, in relation to the commitments of persons in insane asylums, what are the requirements, for the keeper of an insane asylum to receive such persons?

Mr. BAKER: I object, if your honor please.

The COURT: It has been stated somewhere in the testimony that this institution is a private institution; that may not be governed, perhaps by the statute.

The WITNESS: It is.

The COURT: It is?

The WITNESS: Yes sir.

The COURT: There seems to be some regulation in which the Government has something to do, according to the testimony of the principal witness who testified in relation to that matter.

Mr. SIMMONS: As I understand that, all of these institutions are subject to certain rules and regulations, the same as those in this country are.

The COURT: Is that a statutory provision?

The WITNESS: We have two forms of lunatic establishments in England, the county, public asylums, and the private asylums, and they both have to be licensed. The commissioners in lunacy issue licenses to the county establishments, the one licensed by the county authorities, and they both have to be licensed; the commissioners in lunacy issue licenses to the private asylums, but the county asylums are licensed by the county authorities. The commissioners in lunacy are appointed by the government.

The COURT: That jurisdiction extends throughout England?

The WITNESS: Yes sir, throughout England.

62 Q. Now what are the conditions of entrance of a patient, the reception of a patient in an asylum?

Mr. BAKER: I object if it is statutory, and I object further on the ground that it is incompetent evidence, and immaterial in this cause, as to how this man was sent there.

Mr. SIMMONS: Please state your objection and reserve it.

Mr. BAKER: No, I will not. I object now. I ask your honor to rule on that question, whether any issue was involved by reason of which this man was incarcerated—whether or not that is absolutely immaterial in this case.

Mr. SIMMONS: Mr. Baker, you know the court allowed these two certificates, and that question to go over until we could argue it. Now if you want to hold this witness here for pure contrariness, that is another matter, but——

Mr. BAKER: I beg pardon, I am talking to the court.

Mr. SIMMONS: I ask you to allow the witness to testify to these things, and they can be stricken out afterwards, if the court so rules.

Mr. BAKER: I object to the question going before the jury. I say it — absolutely immaterial how this man became incarcerated in this asylum, if any issue was formed by which he was incarcerated, it is absolutely immaterial.

(Further argument followed.)

The COURT (after an examination of the statute which had been referred to, and which is contained on pages 756 to 769 of a volume with the following title page, viz:

"The Statutes:

Revised edition.

Vol. XI.
14 & 15 Victoria to 16 & 17 Victoria.
A. D. 1851–1853.

By authority.

(British coat of arms.)

London.
Printed by George Edwardes and *E*illiam Spottiswoode,
printers to the Queen's Most Excellent Majesty.
1877."

And which volume was obtained from the library of the late Calderon Carlisle, and handed to the witness, and which may br produced at the hearing upon the appeal):

This copy does not seem to contain all that has been referred to; it is an imperfect copy.

These certificates, in connection with this statute show that the sole purpose of making the certificates was to secure the admission of the patient to the asylum. That purports to have been partly upon facts that the officers who made the certificates themselves certified to and partly upon information they received from others. It would appear, I think reasonably, that these certificates were made for reasons of the statute, which has been referred to by
63 the witness, and partly read. Now, I cannot distinguish myself between this situation and the situation of the Massachusetts court. It seems to me to be identically the same. There are no parties to this proceeding, so far as we are advised by any law, and there is no law requiring any parties—simply a compliance with a statute that no persons shall be received in any house, either private or public, until certificates have been made by physicians, as to their being insane and proper subjects for confinement. Without such a certificate they could not have been received lawfully in any institution there, and it was for the purpose of enabling a party to be placed in an institution that this certificate was made.

The issue is whether this party ought to be confined, the same as in the Massachusetts case, when the probate judge rendered his decision in that court. In this case there was a certificate granted to comply with the statute, *ex parte*, and hardly has the dignity of the certificate made by the probate judge in the Massachusetts case, who was a judicial officer. The parties were not before him in this case, and it clearly was not a judicial proceeding according to the courts. The parties have already introduced evidence of persons who saw him while he was in the asylum and have testified as to his appearance and conduct and actions, and so forth. That is introduced as independent and original evidence in the case, by persons who saw and observed him. That is, of course, competent. It does not make

any difference where the man was, if it was within such time as would make such testimony bear, even remotely, upon his condition at the time of the execution of the will, it is proper testimony; but it must be testimony given in the usual way that testimony is given, either in the form of depositions or testimony in open court, to enable cross-examination of witnesses.

I am inclined to think that is the proper way of intro-
64 ducing evidence in this proceeding.

Mr. SIMMONS: Will your honor permit us to prove that he could not be committed without the certificates, but not allowing the certificates to come in?

Mr. BAKER: We object to that.

The COURT: You have proved he was there by witnesses who have testified here.

Mr. SIMMONS: For the purpose of getting in the declaration of the man Cunningham, who is one of the devisees under the will and the man who is charged with the use of undue influence and fraud, I think it would be proper to allow the witness to testify that the law requiring it to be certified

The COURT: I do not see what connection the certificates could have with any declaration of Cunningham.

Mr. SIMMONS: I do not mean the doctor's certificate; I mean the certificates made by Cunningham.

The COURT: I have not seen any such certificates.

Mr. BAKER: He wants to show, I believe, that Mr. Cunningham did what the law required, and that it was undue influence.

Mr. SIMMONS: To show his connection with the case.

Mr. BAKER: We object to it. We object to any certificate of Cunningham or anybody else. There is no evidence that Cunningham made a certificate.

The COURT: Has Mr. Cunningham testified?

Mr. BAKER: No sir.

Mr. SIMMONS: Mr. Cunningham is dead.

Mr. BAKER: Under the decision in the Webb case Mr. Cunningham's declaration could not be used in evidence at all. You will remember, your honor, that they offered in evidence one of the declarations of one of the persons who took under the will, and it was alleged that that party was the one who used the undue influence——

The COURT: Is Mr. Cunningham a legatee?

65 Mr. BAKER: Yes sir, an executor and a legatee.

Mr. SIMMONS: And that declaration was made before the will.

Mr. BAKER: Acco-ding to Mr. Simmons' own contention it is a legal and lawful declaration. I do not see whay he wants to use it as evidence of undue influence.

The COURT: Has it been offered?

Mr. BAKER: He wants to offer it now and we object.

The COURT: I do not know why that should be admissible because it was made before the execution of the will.

Mr. SIMMONS: I contend this; that that is one of the circumstances in the case of undue influence. It is this man's declaration, and he is bound by it.

Mr. BAKER: How are we bound by it, that is the point?

Mr. SIMMONS: I can explain that in two minutes.

(Further argument followed.)

The COURT: There is nothing in this certificate that would bear on the question of undue influence. The certificate is not given to anybody except the superintendent of the asylum, and could bear on nothing except the question of unsoundness of mind at that time.

Mr. SIMMONS: Let me read what the Court of Appeals has said about that question.

The COURT: The only thing that could be allowed to be admitted would be the question of unsoundness of mind, which is the very question which is being considered here, and under the ruling of the Supreme Court, he being a legatee the declarations of a legatee are not competent.

Mr. BAKER: This is what the court said in the Webb case——

The COURT: We must get along in this case. After I have decided the proposition I prefer that you should take your exceptions.

Mr. SIMMONS: I do not know that you have decided that, your honor; I did not know that your honor had decided as to the certificates of Cunningham.

66 The COURT: I gave my view of it just now. It does not seem to me it can be admitted as a declaration because he was a party to this will, connected with it, and there are others connected with it and whose interests are dependant on the decision in this case, and as against them it cannot be admitted.

Mr. SIMMONS: Your honor will refuse to permit him to testify any further?

The COURT: I do not refuse to permit him to testify any further.

Mr. SIMMONS: I mean in relation to the law in regard to any of these certificates.

The COURT: So far as I can see, for the purpose of anything you have proposed to prove yet, it is inadmissible.

Mr. SIMMONS: We simply ask to be allowed to prove the law required——

The COURT: This is an imperfect copy of the statute.

Mr. BAKER: We object to any statement of counsel as to what he proposes to prove.

Mr. SIMMONS: I do not want to state what I intend to prove. I simply ask to be allowed to prove that the law required that before a person could be committed that the certificates of his doctors and his friends should be obtained.

The COURT: I have overruled the questions you have asked. If you have any more you had better present them and let the court pass upon them.

Mr. SIMMONS: That is all we have to do with this witness, and we wish to note an exception.

67 And thereupon the plaintiffs to further maintain the issues upon their part joined, produced as a witness in rebuttal Dr. J. H. MANNING, who testified by deposition, as follows:

Q. What is your business or profession, and how long have you been so engaged? A. I am a registered medical practitioner, and have been for forty years.

Q. If you say you are connected with any institution, state the name of same, and for what purpose it is maintained? A. I am medical officer and licensee of Laverstock House private asylum near Salisbury, England.

Q. Did you know William Thomson, late United States consul to Southampton, England? A. I did.

Q. When did you first learn of or know him, and who first spoke to you about or introduced you to him? A. I believe Dr. Scott, his medical man at Southampton, wrote to me to ask if I could receive him for treatment.

Q. When did you first see him? A. On the fifteenth of December, 1885.

Q. If you say he was committed to your care, or the care of any institution with which you are connected, state when he was committed? A. On the fifteenth of December, 1885.

Q. What were the names of the persons who brought him to said institution, and upon whose authority was he committed? A. I cannot say who brought him. My authority to receive him was an order from his cousin, Mr. Cunningham, supported by two medical certificates signed by Prof. Aitken of Nebley, near Southampton, and Dr. Scott of Southampton.

Q. If you say Thomson was committed to your care, or an institution with which you are connected, state when he was
68 committed, and upon whose advice or certificate he was committed? A. Same as 7th.

Q. If you say he was committed upon the certificate of any person, state if you have said certificates, and if so, give the date of same and allow them to be copied into your evidence. A. Copies are attached hereto.

Q. What was the condition of the bodily health of said Thomson at the time he came to your place? A. He was suffering from Bright's desease of the kidneys. He was aenæmic and rather feeble.

Q. Did you know, or could you judge his age at the time. If so please state what it was or what age he appeared to be? A. He was sixty-nine years of age.

Q. What was his mental condition at the time he was committed? A. He was excited. He believed he was in New York, and that several strangers here were old friends and his conversation was rambling and incoherent.

Q. If you say his mental condition was impaired, state as near as you can in what way? A. Same as 12.

Q. If you say he was of unsound mind, assuming that the mother of said William Thomson was of unsound mind for many years

prior to her death, would you say that such had any bearing upon his case as to the cause of his mental condition? A. I am of opinion that the mania was the result of weakness following desease of the kidneys, and old age, and was not necessarily transmitted.

Q. Did he have hallucinations. If so state fully what he did or said when under same? A. He had no hallucinations, but suffered from delusions as mentioned in No. 13.

69 Q. I hand you three letters, one of December 15th, 1885, one of December 16th, 1885 and one of January 12th, 1886, purporting to have been written by you while Mr. Thomson was under your care, and also a note purporting to have been written by Mr. Thomson at or about the time one of the letters were written. Please examine same and state if you ever saw them, if you wrote the letters, when and why you did so and how you received the note and whether or not Mr. Thomson wrote it.

NOTE.—The commissioner will please initial these papers for identification, and attach them to the depositions of Dr. Manning.

A. The three letters produced were written by me on the dates mentioned, and for the purposes mentioned. The note written by Mr. Thomson was handed to me to forward to the address.

Q. If you say you have seen the papers before; state if the letter is in your handwriting, and at what time you wrote same. A. See last answer.

Q. If you say you received the note referred to herein as having been written by Mr. Thomson; state how you received it and if you know it to be written by said Thomson and at what time. A. The note was written by Mr. Thomson and handed by him to me to forward.

Q. Who came to see Mr. Thomson while he was so confined. A. His cousin, Mr. Cunningham, and Dr. Scott.

Q. If you say that James E. Cunningham called; state how often and whether or not he was alone with said Thomson when he did so. A. Mr. Cunningham came once only, and then in company with Dr. Scott.

70 Q. What is meant by a patient being discharged with a certificate. A. Under an act of Parliament, a person with the consent of two visiting justices can be discharged upon probation for a period named in the form of leave of absence; Mr. Thomson was under that clause granted leave of absence upon probation on the 1st of February 1886, and was on the recommendation above of Dr. Scott finally discharged on the 26th day of June 1886, as recovered, without returning to Laverstock house. A form of leave of absence is annexed hereto.

Q. When was said Thomson finally discharged from his certificate. A. See last answer.

Q. At whose suggestion did Thomson leave your institution. A. He left at my advice after a consultation between Mr. Cunningham, Dr. Scott and myself.

Q. When did he leave, and who took him away? A. He left on the 1st of February 1886, with a medical man and an attendant.

Q. Did any person request that his confinement to your institution be kept a secret? If so who. State fully. A. No special request for privacy was made to me as far as I can remember.

Q. At the time he left your institution was he entirely cured. A. In the opinion of Dr. Scott and myself he was so much better as to entitle his release upon probation. His delusions and incoherence had quite disappeared.

Q. Was he easely persuaded while in your care. A. I should say certainly not.

Q. Has Walter R. Lomer Esq. of Southampton, or any other person in his behalf talked to you about Mr. Thomson's case. If so when was it, and what did he say about same. A. No.

Q. Have you written to any one about the case of Mr. Thomson since January 1st 1901. If so will you please state to whom, and what the contents of your letter were. A. The only person I
71 have written to is the United States consulate at Southampton, in reply to a letter from him asking for the date of admission and discharge of Mr. Thomson.

Q. Does your institution keep a record of such cases as Mr. Thomson's? A. Yes.

Q. Have you a record of his case in your institution? If so will you please give a certified copy of same under your hand and seal of the institution, if it has one. A. The institution is a private one, has no seal, and I cannot part with my case book, or a copy of it. The only persons entitled to inspect it are the commissioners of lunacy of this country, and the visiting justices.

Q. Taking in all the conditions of Mr. Thomson's case, and assuming that insanity of long standing existed in Mr. Thomson's immediate ancesters, would you say that he was capable of attending to extraordinary business, requiring extraordinary care and attention, at the time he left your institution, or within a few days thereafter? A. Mr. Thomson was in my opinion quite capable of understanding ordinary business matters on the day he left this institution, but it would have been unwise for him to have then un-taken any extraordinary business.

Q. Why was he not discharged sooner then June 1st 1886. A. Because his time of probation had not expired. When he was discharged he was classed as "recovered" on the advice of Dr. Scott, his medical attendant. See also answer 21.

Q. State anything else you — that would tend to show Mr. Thomson's true condition during the time of his confinement at your institution. A. I have nothing more to add.

(Signed) H. J. MANNING.

9th, August 1901.

And thereupon the plaintiffs offered in evidence the follow-
72 ing letter, which is shown to have been written by *by* the said William Thomson in December 1885.

DECEMBER, 1869.

DEAR JAMES: Will you send me the best quality of tobacco by Monday. Send me the best 2 backs you can.

Y'rs sincerely, WILLIAM THOMSON.

(This is the note referred to in interrogatory No. 16 and the answer there-.)

H. J. SHUTER.

And thereupon the plaintiffs offered in evidence the following letter, dated December 15th, 1885, of the last-named witness, referred to in his deposition. To the introduction of which the defendants objected. Said objection was sustained and plaintiffs excepted.

Laverstock house, Salisbury.

15TH DEC., 1885.

MY DEAR SIR: I enclose you a note written to me this morning by Mr. Thomson. If it has been his habit to smoke it will do him no harm now in moderation, and you will perhaps be kind enough to send him what he has been in the habit of using, either pipe or cigars or cigarettes. If he has never been a smoker, he must not begin now. But he spent an hour or so in the billiard-room of an evening, and smoking is a social custom in which he has seen others indulge. He continues to behave very calmly, enjoys his food, and sleeps sound. But he seems to believe he is in America, and he thinks that he has not been in Southampton for years.

I am, dear sir,

Yours very truly, H. J. MANNING.

W. T. Weir, Esq.

(This is the letter dated 18th of December, 1885, referred to in interrogatory No. 16, and answer thereto.)

H. J. SHUTER.

And thereupon the plaintiffs offered in evidence the following letter, dated January 12th, 1886, referred to in the depositions of the last-named witness. To the introduction of which the defendants objected; said objection was sustained and plaintiffs excepted.

Laverstock house, Salisbury.

12TH JANUARY, 1886.

DEAR DR. SCOTT: Mr. Thomson has now thrown off his bronchitic attack and has been about same as usual for the last few days. He was at a dance here last evening and appeared to enjoy himself much. He is more generally calm now but still very confused and apt to become very incoherent but speakiug generally his mental symptoms are not quite so marked as they were. I am with kind regards.

73 Yours very truly,

(Signed) H. J. MANNING.

Dr. Scott.

(This is the letter dated 12th January 1886 and referred to in interrogatory 16 and answer thereto.)

H. J. SHUTER.

And thereupon the plaintiffs offered in evidence the following letter dated December 16th, 1885, written by the last-named witness, and referred to in his deposition. To the introduction of which the defendants objected. Said objection was sustained and the plaintiffs excepted.

Laverstock house, Salisbury.

16 DECEMBER, 1885.

MY DEAR SIR: Mr. Thomson has passed a very quiet night and is calm enough today. Of course he is a good deal puzzled as to his whereabouts, but he seems likely to settle down quietly. He takes food well and has enjoyed a stroll about the gardens. I shall be *gald* if you will send him the New York papers as you suggested. They can be addressed to me with his initials in the corner, or to him direct, as you may prefer.

The matron asks me to say that the list of clothing is correct, except in one particular, viz., one pair of trowsers. These, she tells me, were not in the portmanteau. Do not trouble to send them, but it is well to note their absence.

I am dear sir,

Yours very truly,

(Signed) H. J. MANNING.

W. T. Weir, Esq.

(This is the letter dated the 16th of December 1885 referred to in interrogatory 16 and answer thereto.)

H. J. SHUTER.

Thereupon the plaintiffs offered in evidence the following paper, purporting to be an order for the reception of private patients in the institution over which the last-named witness had control, and which was referred to and offered in evidence with the depositions of the last-named witness, Dr. Manning, to the introduction of which the defendants objected. Said objection was sustained and plaintiffs excepted.

Order for the Reception of a Private Patient.

I, the undersigned hereby request you to receive Mr. Wm. Thomson, United States consul, at Southampton, whom I last saw at Southampton, 24 Cumberland place, on the 12th, day of December 1885, a person of unsound mind, as a patient in your house. Subjoined is a statement respecting the said William Thomson.

(Signed) JAS. E. CUNNINGHAM,
Merchant, South Kensington, London.

74 Degree of relationship: Cousin.
Dated this 12th day of December, 1885.
To Dr. Manning, supt. of Laversto-k house, Salisbury.

Statement.

Name of patient with Christian name: William Thomson.
Sex and age: Male. 69.
Married, single or widowed: Single.
Conditions of life and previous occupation (if any): United States consul, Southampton.
Religious persuasion as far as known: Protestant.
Previous place of abode: 24 Cumberland place, Southampton.
Whether first attack: First.
Age (if known) on first attack: Three months since.
When and where previously under care and treatment: ——
Duration of existing attack: About two or three months.
Supposed cause: Albuminuria.
Whether subject to epilepsy: No.
Whether suicidal: A tendency slightly I am told. Cannot personally vouch for it.
Degree of relationship: Cousin.
(Signed) J. E. CUNNINGHAM,
37 *Courtfield Gardens, South Kensington, London.*

And thereupon the plaintiffs offered in evidence the following paper, purporting to be a medical certificate made and signed by one William Aitken, on December 14th, 1885, which paper was referred to in the deposition of the last-named witness, Dr. Manning. To the introduction of which the defendants objected, which objection was sustained and the plaintiffs excepted.

Medical Certificate.

I, the undersigned, Wm. Aitken, being a doctor of medicine of the University of Edinburgh, a member of the College of Surgeons of Edinburgh, and being in actual practice as a consulting physician, hereby certify that on the 14th day of December, 1885, at 24 Cumberland place, Southampton, in the county of Southampton, separately from any other practitioner personally examined Mr. Wm. Thomson, of 24 Cumberland place, United States consul at Southampton, and the said William Thomson is a person of unsound mind, and a person to be taken charge of and detained under care and treatment, and I have formed this opinion upon the following grounds—1st. Facts indicating insanity observed by myself, incoherence of his statements, confusion of thought, incapacity to finish a sentence when begun. Delusion as to where he is, considering himself sometimes in America and elsewhere. 2nd. Other facts indicating insanity communicated to me by the patient's nephew, Mr. Wm. T. Weir. Danger to himself and others; secretative as to hiding letual weapons about his person. Violent efforts to go out of the house, necessitating the presence of two men servants in the house to take charge of him and to prevent his destruction of his own property.
(Signed) WM. AITKEN, M. D.,
Grove Cottage, Hants.
Dated the 14th day of December, 1885.

(This is the copy of certificate referred to in answer to interrogatory No. 9.)

H. J. SHUTER.

75 And thereupon the plaintiffs offered in evidence the following paper, purporting to be a medical certificate, signed by one Geo. Scott, M. D. and dated December 14th 1885, which was referred to and offered in evidence with the deposition of the last-named witness, Dr. Manning. To the introduction of which the defendants objected. Said objection was sustained and the plaintiffs excepted.

Medical Certificate.

I, the undersigned, Geo. Scott, being a doctor of medicine of the University of Edinburgh, and being in actual practice as a physician and sergeon, hereby certify that on the 14th day of December 1885, at 24 Cumbreland place, Southampton, in the county of Southampton, seperately from any other medical practitioner, personally examined Wm. Thomson, United States consul, of 24 Cumberland place, Southampton, and that the said Wm. Thomson is a person of unsound mind, and a person to be taken charge of, detained under care and treatment, and that I have *in*formed this op-nion on the following grounds:

1st. Facts indicating insanity observed by myself. It is difficult to get him to converse coherently on any subject. He has many "delusions" first that he is not in his own house. Second, that those *those* around him are plotting against him. Third, he has asked me, an intimate friend, whether I was ever in the house before today.

2nd. Other facts indicating insanity communicated to me by others. Mr. Wm. T. Weir, a relation who resides with him, tells me that he flung an inkstand out of the window the other day, that he makes many attempts to get out of the house and behaves generally in an unruly and violent manner.

(Signed) GEO. SCOTT, M. D.,
5 *Lower Prospect Place, Southampton.*

Dated this 14th day of December 1885.

(This is the copy — certificate referred to in interrogatory No. 9.)

76 And thereupon the plaintiffs to further maintain the issues upon their part joined, in rebuttal produced as a witness one WILLIAM THOMSON WEIR, JR., who testified to the following effect: "I am 33 years of age. I knew William Thomson, consul at Southampton, and knew his mother from childhood up. I was nine years old when I first knew him. I remember her distinctly. She died when I was about nine years old. I was born in 1868. She died in 1876 or 1877. One act particularly noticed of her insanity, she used to have a way of tearing up paper and wrapping it up and putting it away as money; would not allow any one to touch it;

that was her wealth, she would be very careful of it. When she would talk with you, you could not understand what she was saying; she would mumble. First knew William Thomson when I was a child. Cannot state the day or year, but recollect him *for* the time I was a child. He used to come to my father's house. I went to live with William Thomson, in Southampton in February 1885, about two years before his death. I remained in William Thomson's house until about January 10th, 1886. About 1st of 1885, I noticed he wanted to get out of bed and go out into the street without putting on his clothes. That was in October 1885. We would get him back in bed and he would try to do the same thing over again. He was taken away on December 15th, to the Laverstock insane asylum. I accompanied him there. He had two men attendants and the clerk, Fred Hiscock. Between October 1st 1885 and December 15, 1885, he would try to pick hot coals out of the fire and drop them and pick them up with his bare hands and they would burn him. He would blow out the candle and take it and suck it; and if we undertook to take it away from him, then he got wild; so we just let him go ahead. Then he would get up and get dressed, and in about two or three minutes he would undress himself again and get into bed and he wouldn't be there more than four or five minutes, or probably a little longer—maybe ten minutes—when he would get out of bed and dress again and walk into the drawing-room, bow, and say, "Good evening" or "Good morning" and no one would be there. He would stuff his clothes full of paper, take the paper out of the room, fold up a newspaper—take letters and stuff in his clothes and try to set them afire with another piece of paper. I remember one time he picked up an ornament from the mantel and threw it right through the window—supposed he was throwing it at some imaginary person, but we didn't find that out; but he picked it up and threw it right through the drawing-room window. We would take him out driving, and always have one of the attendants with him, for he was wild at times, so that we always had a man along with us, and after being out driving an hour or two and going back to the house,
77 when we got to the house he wouldn't get out, so we would have to drive around the block four or five times, stopping at the house every time, and at last he would get out and go into the house. When we undertook to force him to do anything, then he would get wild and begin to pitch around and tear things up generally. When we brought his meals to him we had to put the food in his mouth. His appetite was elegant. He was a man who weighed from 225 to 240. I saw him weigh. He weighed 240 at the time I saw him weigh.

We used to get him to sign checks so we could get money to carry the house along. We put the check before him and covered it up and asked him to write his name there. The president of the bank knew Mr. Thomson's condition, and he said he knew me well enough and he paid the checks. Mr. Jas. E. Cunningham knew I was having the checks cashed. I would make out a check, or the clerk would

make it out, and take it to Mr. Thomson to sign. Sometimes it would take us quite a few minutes to get the checks signed. We would get him to write his name all over it, and then we would put the check in front of him and often without covering it, and he would sign it without a word. We never had to explain to him what it was for. He did not know what it was he was signing. All these acts took place between October 1st 1885 and the time he was taken to the insane asylum, December 15th, same year. That the amounts drawn from the bank was used to pay clerk hire and household expenses, and in all amounted to about $800.00. That he made a full statement of all money so drawn and how it was used and left it for Mr. Cunningham when he, witness, left for home. After he became violent like that he was in charge of two men, one for the night and one for the day. The attendants used sometimes to get him to sign checks. He would get an umbrella and put it up and walk through the house with it over his head. Sometimes he would have his clothes on, and he would do the same thing when he would not have his clothes on, except his night shirt, or he would get himself half dressed an- do that in his underclothing. I have seen him want to go out without being dressed in cold weather. Often on occasions we would ask him to go out driving, and we had to bother to get him dressed to go out for a drive. These things occurred continually all the time. He often used to put the umbrella up over his head and walk about the house that way. I visited him in the asylum. I went to see him several times. He would not do anything much; that is the trouble; he did not do anything, he just looked at me. I never saw James E. Cunningham there but once while I was there. That was shortly after I arrived. I was in touch with Mr. Cunningham all the time while Mr. Thomson was in the condition named. He came to the house and he sent for me to come to London. Stayed with *us* for a few days in town. He was present when Mr. Thomson was taken to the asylum and was consulted in relation to taking him there. He was taken there at Mr. Cunningham's suggestion.

Mr. Cunningham took charge of all Mr. Thomson's affairs when Mr. Thomson was taken to the insane asylum. Mr. Cunning-
78 ham and the president of the bank gave their consent and authority to having the checks prepared and signed. They were necessary to carry on the house expenses. When I left there I left a copy of the amounts I had drawn from the bank for Mr. Cunningham. Mr. Thomson frequently talked of his relations in America, especially Mrs. Christina Weir, and often asked me how they were getting along. He spoke a good deal of my mother, and I believe he liked her very much, a good part of the conversation was about her. I was invited by Mr. Cunningham to come to see him, and Mr. Thomson, after he had gone, asked me not to go there. He said he did not want me mingle with those people.

Mr. Cunningham's place of business is No. 4 Arthur street, West London Bridge. That is three or four miles from his house. His place of business is a large warehouse and office. I never saw any

of the parties, Mary Cunningham Roberts or Elizabeth Cunningham, at Mr. Cunningham's place. I do not know who Mary Cunningham Roberts is, and I do not know who Elizabeth Cunningham is. Mr. Cunningham told me there was about $30.00 in the hands of Samuel Augustine Thomson. He said the picture mentioned in the will (as being devised to C. and J.) was worth $10,000.00 that is what he valued it at. His household furniture was pretty expensive, and lots of solid silverware. I took an inventory of it with him."

Q. In this paper purporting to be his will it is stated that a certain amount of bonds were in the hands of Samuel Augustine Thomson's hands. Did he state how much bonds or money was in the hands of Samuel Augustine Thomson? A. He told me that there was about $30,000.00 in Mr. Samuel Thomson's hands.

79 Q. In this will he purports to have a picture which he directed to be sold, and he directed that the proceeds be divided between James E. Cunningham, executor, and the two ladies in this case. State what was the value of that picture, from what you learned from him. A. $10,000.00.

Q. That was the value of the picture? A. That is what he valued it at.

Q. Do you know what his household effects consisted of? A. I do.

Q. Now, do you know what the value of these were, from any information? A. There was pretty expensive furniture and lots of solid silverware.

Q. Did you ever take an inventory of the silverware with him? A. Yes.

Q. Have you that or a copy of it? A. Yes.

Q. Have you it with you? A. Yes.

Q. From taking that inventory that you have there, what did you consider that property worth?

Mr. BAKER: I object. He has not shown that he is an expert as to the value of the silverware. He seems to be an expert on some other things.

The COURT: He may show you would have to show that you are familiar with the value of silverware in order to give us any intelligent testimony on the subject.

80 Mr. SIMMONS: He may show from the inventory what value he placed on it, and Mr. Thomson considered it to be worth.

Mr. BAKER: We object.

The court sustained the objection and refused to allow the witness to answer and the plaintiffs excepted.

Q. You testified that the seal of the consulate was kept at the consulate and was not allowed to go out? A. Yes, sir.

Q. When people would come there to have these certificates to signatures made and certified to what was the mode of obtaining the signature of the vice-consul, what was the custom of the office?

Mr. BAKER: I object.

The COURT: That is, if he knows what the custom was and he was there.

81 Mr. SIMMONS: Do you know what the custom of the vice-consul was as to the giving of these certificates?

A. At that time, I do, that was when I was there.

Mr. SIMMONS: He was there for a year.

The COURT: What length of time were you there?

A. I was there about a year.

The COURT: And during that time you were familiar with the customs of the office?

A. I was in the consulate every day.

The COURT: And did you become familiar with the custom of signing certificates, that is, of the vice-consul's signing certificates?

A. Well, I seen what was done in the office.

The COURT: Mr. Baker, do you wish to cross-examine him as to that now?

Mr. BAKER: Yes, your honor.

Cross-examination.

By Mr. BAKER:

Q. How often were you at the vice-consul's? A. The vice-consul had no office.

Q. What do you know about what he did when he came and what was his method of conducting business? A. What did he do when he was there?

Q. Yes sir. A. The vice-consul did nothing.

Q. That is what I thought.

The COURT: Some witnesses has testified to the execution of that certificate.

Mr. BAKER: It was Mr. Cooksey. Did you ever see any will or deed at the office?

A. No, I saw papers, but did not know the contents of them. As a rule, when the papers were brought we would not look at the contents at all.

82 Q. Did you ever hear anybody acknowledge a will before Mr. Thomson? A. No.

Q. Did you ever know of any one coming in and acknowledging a deed? A. No.

Q. The papers you refer to were merely of people coming in and having the signatures verified? A. Yes; the signatures verified.

Direct examination resumed:

Mr. SIMMONS: Did you know what was the custom of executing all papers in the office of the consul.

Mr. BAKER: I object.

The COURT: I cannot allow that.

Mr. SIMMONS: Did you see while Mr. Thomson was not at this office during that time that you were there, the mode and form of executing all papers that came there for the purpose of obtaining signatures?

Mr. BAKER: I object.

The COURT: The question is leading; he has already testified that he did not see any other signatures except those signed to certificates—except to verify signatures?

The WITNESS: I did not know the contents of the papers. I could not tell whether they were wills, deed or——

Q. Do you know of Mr. Cooksey having signed a certificate of this character to papers without having the party signing it present?

Mr. BAKER: I object.

The COURT: The question is not admissible because the witness does not know whether the paper was a will or a deed.

Q. State whether or not you have any knowl-dge of the certificate being made to the papers, that is, all the papers that came
83 into the office while you were there and whether or not Mr. Cooksey certified them without having the party in his presence.

Mr. BAKER: I object, that is leading.

Q. State whether or not he certified them while the parties were there or were not present.

Mr. BAKER: I object.

The COURT: Some papers were simply certified to for the purpose of verifying the signature, where he knew the signature.

Q. Did you have forms for these certificates in this office?

Mr. BAKER: What certificates?

Q. Certificates to signatures. A. Yes, sir.

Q. Was the same form used in all papers? A. Yes.

Mr. BAKER: The witness is testifying about something he does not know anything about. He has already said he does not know whether they were wills or deeds.

Q. Now state whether or not under the general form and custom of the office, Mr. Cooksey certified the papers stating that the party who acknowledged it was present, when he was not present.

The defendants objected to the question being answered and the court sustained the objection. To which ruling the plaintiffs excepted.

84 Said witness further testified:

"Mr. Thomson would sign papers in blank, two or probably three, and tell the clerk to make out his report (to the State Department). We would sometime- take them up to the house and sign and then take them back to the office and they would be filled out by the clerk. Most of the clearance papers were signed in that

way. The clerk put the seal upon same. (Mr. Hiscock, his clerk.) Mr. Thomson had made a former will, just before being taken sick. In the latter part of 1885 I had it in my possession and sent it to my father in America, who was one of the executors named therein, after Mr. Thomson was taken sick.

That Mr. Thomson had told him previously to being taken ill that he had made such a will and he would find it among his (Thomson's) papers in case anything happened to him. Afterward the will was *was* returned to Mr. Thomson to England. I have since made a search for the will, and inquired of Mr. Cunningham's relations in England, and at the probate court in England, but could not find same. It was last February."

Thereupon the plaintiffs called upon the defendants to procure the said former will.

Mr. LAMBERT: We have no idea of producing it.

Mr. BAKER: Oh, Mr. Simmons, what is the use of talking foolishly.

And the witness continued to testify:

"The property was left all to myself and two brothers. It had but two witnesses to it,—Earnest W. Lowington and his
85 brother Arthur Lowington. I was a companion to Mr. Thomson. He did everything for me. He wanted to educate me in a French school. It was his intention to send me to school when he was taken sick. We went away together, and almost every place he went I went. He wanted me to take his name when we came back to America. I received nothing by the alleged will in question, and my brothers received nothing. I was constantly associated with my cousin, or uncle as I called him, said William Thomson, and never saw him use tobacco in any way."

86 Whereupon the plaintiffs produced as a witness WILLIAM THOMSON WEIR, SR., who testified to the following effect:

"William Thomson, consul at Southampton, was my second cousin. At the time of his death I had known him twenty-five years. I met him some time in 1862. I was just grown up. I was visiting an uncle, James Haig. He was there at dinner. When he was appointed consul he generally wrote me once in two weeks, and that correspondence kept up until my son went there, and then I heard from him through my son. I knew Peter Thomson, William Thomson's uncle, he did not know whether he was married or not. Then he wandered away and we hunted him up. My uncle asked me to try and hunt him up, and we started out on Sunday afternoon; went first to the city hall (in Philadelphia). I found him. There was a man who answered the description in the Richmond police station, and I went there and saw him walking around the floor. I said 'Uncle Peter, do you know me?' He said, 'I mind the name.' I took charge of him and brought him back to our house. Then took him to my uncle's house. He was between 70 and 78 years old when this occurred. He lived a couple of years

after that. I knew William Thomson's mother from the time I was ten or twelve years old. She was insane also. She was in my house ten or twelve years. My wife and I took care of her."

Witness further stated that he had received thirty thousand dollars under the will here in controversy and that Thomas Haig received fifteen thousand dollars, said sums being proceeds of real estate situate in New York city.

Witness gave further evidence tending to show that the mother of said William Thomson had been insane for many years prior to her death. Said witness gave further evidence tending to show that said William Thomson had made a former will in his own handwriting, which is attested and subscribed by two witnesses only. That he had seen said will and examined it; that none of the devisees mentioned in the will in question were mentioned in said former will; that in the first will the testator had made provisions for bringing his remains to this country to be buried in the family vault at Trenton, New Jersey. There his, the testator's mother, father and brothers, were buried.

87 The plaintiffs to further maintain the issues in rebuttal upon their part joined, offered documentary evidence produced from the United States Treasury Department, and purporting to be certain accounts rendered between July 1885 and June 1886, from the office of said William Thomson, as United States consul at Southampton, whereby it was shown by said accounts, that charges at the rate of two dollars each had been made at said consulate for certain certificates to signatures of various persons, the same being intended as receipts of the office of said consulate.

Thereupon the plaintiffs, for the purpose of showing that the signature to the certificate attached to the alleged will and purporting to be made by John H. Cooksey, was not intended as a witness to its execution and had been so treated by the English courts. And for the further purpose of showing that at no time after said alleged will was offered for probate, did the signature of the testator appear on the first page of will offered in evidence: the following certified copy made in 1887, and which purported to be a copy of this same paper, from which the copy offered by the defendants was taken.

Copy.

(Revenue stamp.)

Extracted from the Principal Registry of the Probate, Divorce, and Admiralty Division of the High Court of Justice.

This is the last will and testament of me, William Thomson, late of Washington city in the United States of America, but at present of number 24 Cumberland place in the town and county of Southampton, England, consul at Southampton aforesaid for the United States of America.

I hereby revoke all former wills and testamentary dispo-

sitions made by me I direct all my just debts and funeral and testamentary expenses to be paid as soon as conven-
88 iently may be after my decease. I appoint James E. Cunningham of number 4 Arthur street West London bridge in the city of London merchant George Scott of number 4 Lower Prospect place in the said town and county of Southampton doctor of medicine Samuel Gustine Thomson of number 1630 Spruce street Philadelphia Pennsylvania in the said United States of America attorney-at-law and Simon J. Pardessus of number 10 College place New York in the said United States of America (hereinafter called "my trustees") to be the executors and trustees of this my will I bequeath all my wearing apparel to William Thomson Weir the elder of No. 200 North Eight street Philadelphia aforesaid and Thomas Haig of number 926 North Fourth street Philadelphia aforesaid equally between them I bequeath my Colombian bonds to Maria Guthrie of No. 63 South Cleek street Edinburgh Scotland, spinster I devise my house and premises situate in the Seventeenth street Washington aforesaid unto Mary Cecile Thomson and Georgiana Hawkes Thomson both of No. 3 Copthall Villa Folkestone in the county *o*g Kent England spinsters for their joint lives and to the survivors of them for her life and from and after the decease of the survivor of them the said Mary Cecilia Thomson and Georgiana Hawkes Thomson then I devise the said house and premises unto Mary Cunningham Roberts (the wife of Coryton Roberts of Ceylon coffee-planter) of number 4 Arthur street West London bridge aforesaid for her life and from and after the decease of the said Mary Cunningham Roberts then I devise the said house and premis*es* unto *to* her only son now aged ten years of age or thereabouts absolutely I devise my house and premises situate at the corner Sixth avenue and Thirteenth street New York aforesaid and bequeath all my bonds and securities which are now or at *at* the time of my death m-y be in the possession of the said Samuel Gustine Thomson for the safe custody thereof my oil painting purporting to be portraits of Columbus and his sons and my furniture plate linen china glass books pictures prints wines liquors
89 and other household effects unto my trustees upon trust that my trustees shall sell and convert into money the same and shall divide the monies to arise from such sale and conversion and after deducting thereout the costs charges and expense of an- incident to such sale amongst the persons and in the proportions following that is to say as to the net proceeds of sale of my said house and premises at New York two-fourths parts thereof to the said William Thomson Weir one other fourth part thereof to the said Thomas Haig and the remaining fourth part thereof to Elizabeth Cunningham of number 4 Arthur street West London bridge aforesaid widow as to the net proceeds of said sale of my said bonds and securities one-eight part thereof to the said Maria Gurthrie and the remaining seven-eights parts thereof to such of the daughters of the said James B. Cunningham as shall attain the age of twenty-one years or marry under that age in equal shares As to the net proceeds

of sale of my said oil painting one-half part thereof to the said James E. Cunningham and the other half part thereof to Janet Thomson Welch the wife of Alexander Welsh of Waughton Preston Kirk East Lothian Scotland And as to the proceeds of sale of my said furniture and household effects one-fourth part thereof to the said Maria Guthrie one other fourth part thereof to the said Mary Cecilia Thomson one other fourth part thereof to the said Georgiana Hawkes Thomson and the remaining fourth part to the said Mary Cunningham Roberts I devise and bequeath all my real and personal estate not hereby otherwise disposed of to the same persons and in the like shares as I have lastly hereinbefore bequeathed the proceeds of sale of my said furniture and household effects In witness whereof I the said William Thomson have to this my last will and testament contained in two sheets of paper and to each sheet thereof set my hand this twenty-fourth day of February one thousand eight hundred and eighty-six.

WM. THOMSON.

Signed and acknowledged by the said William Thomson
90 the testator as and for his last will and testament in the presence of us both being present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our name- as witnesses.

WALTER R. LOMER,
Solicitor, Southampton, England.
R. ROPPE LINTHORNE,
His Articled Clerk.

On the 25th January, 1887, probate of this will was granted to James Elliot Cunningham, one of the executors.

I certify that this copy has been examined with the original will deposited in this registry and that it is a true copy thereof.

(Signed) CHAS. J. MIDDLETON, *Registrar.* [SEAL.]

Ex'd. J. J.

Consulate General of the United States of America for Great Britain and Ireland, at London.

I, Thomas M. Waller, consul general and *ex officio*, a notary public of the United States of America at London, England, do hereby make known and certify to all whom it may concern that Charles J. Middleton, who hath signed the annexed certificate to the office copy of the last will of William Thomson, deceased, is a reg-
91 istrar of the probate division of the high court of justice of England, duly authorized, and to me well known. And I further certify that the seal affixed to the said certificate is the seal of the principal registry of the said probate division of the high court of justice aforesaid, and to all acts so authenticated as the annexed, full faith and credit are and ought to be given in judicature and thereout.

In testimony whereof, I have hereunto set my hand and seal of office at London aforesaid, this 5th day of May in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] (Signed) THOMAS M. WALLER,
Consul General.

Thereupon the plaintiffs produced as a witness, A. B. RICHARDSON, a physician having made a special practice of mental diseases, who is now superintendent of the St. Elizabeth Government insane asylum, who testified as an expert to the following effect:

Q. Assuming that a man of the age of seventy years and insanity existed in his near relatives, such as mother and uncle, and that on or about October 1st, he committed such acts as putting his
92 hands in the fire, and taking out coals, walking around the house apparently conversing with the empty walls, trying to get out in the cold with no clothing on, and breaking up his furniture and walking around the house with an umbrella over his head; supposing that the man was taken after the first of October, say on the 15th of December, to an insane asylum, for treatment, and assuming that he remained there until the first of February the following year, and that it was shown that his delusions and insane acts were the result of old age and Bright's disease of the kidneys and feebleness, and necessarily transmitted, and that he was in an anæmic condition; and that his symptoms continued, such as talking with people he had never seen and imagining they were his intimate friends; that he had hallucinations and delusions while in the hospital; assuming further that on the first of February he was released on probation for four months with an attendant and a physician, and that his delusions and incoherence had disappeared and he was capable of attending to ordinary business, what would you say as to such a man's disease being of a permanent nature.

The WITNESS: The element in the case that is most likely to influence the future of it is, perhaps, the age. At seventy years of age any form of mental disorder, continuing for a number of months, is almost of necessity likely to leave a greater impress on the organization of the individual than at an earlier period. Every case of insanity, however, must be considered on its individual aspects and judged of itself, and I do not think it is possible to formulate a rule that will be of universal application. The description of these symptoms shows quite an acute attack of excitement—what we would call mania. At the same time, they have an element of demnitia with them, out of the ordinary character of acute mania, and have that significance undoubtedly from the age at which they appeared. The especial character of many
93 of these acts are not such as you ordinarily find, even in acute mania and for that reason they indicate a certain association with the manaical state of dementing symptoms. We mean by dementia the impediment of mind. Now, from the extent to which that existed, it would seem very improbable that the individual could be entirely as well after the acute symptoms of excitement had

subsided, and that there would not remain a certain amount of weakness of mind. That is the rule and it is of almost universal application at that period, that there is a certain amount of enfeebleness of mind remaining, although there may have been attacks of acute mania which have entirely subsided.

Mr. SIMMONS: Assuming that this man died——

Mr. BAKER: Let the doctor finish his answer.

The WITNESS: I mean as far as the mania or excitement is concerned, that may entirely subside; the only question is as to the degree of enfeebleness of mind that remains; it is more likely to be greater as age progresses, and the later in life these acute attacks occur, the more likely and more extreme the degree of enfeebleness that remains after the attack. The degree of that enfeeblement varies, however, a great deal in different cases.

Mr. BAKER: The doctor has not yet answered the question. It seems to me the hypothetical question put was such as to create a status in the man Thomson which would make him permanently insane.

Mr. SIMMONS: To indicate permanent insanity.

The WITNESS: I cannot answer that by yes or no, because it is not possible to do it. I tried to explain that in all probability there would be a certain amount of enfeeblement of mind remaining; whether that would be sufficient to be called insanity or not is question that would only be determ-ed by the evidence in the
94 particular case. I think after such an attack as that there would be a certain amount of enfeeblement of mind remaining, but how extreme this would be it would not be possible to state; the facts themselves would have to demonstrate that. In this case, assuming that the man in question was discharged as recovered in June, the assumption would be that he would be in condition at least to take care of himself and do his ordinary business transactions; that is what we usually take to justify a discharge as recovered; he may not be entirely what he was before he may not have the strength of mind nor the capacity to undertake all kinds of business, but we assume ordinarily that when a patient is in a condition to be discharged as recovered, it means that he has reached such a degree of improvement that he can take care of himself and transact the ordinary routine duties of his position or business in life in a safe manner.

Whereupon the plaintiffs propounded the following question to the said witness:

Q. State whether or not, in your professional opinion, if a person that had been so confined and shown the violent sym-toms as described and indications, would be more readily influenced after such sym-toms had subsided than he would while they were on him.

Intending to show by said witness that a person such as had been described was more re-dily influenced after his violent symptoms of dementia had subsided than while such violence continued.

The defendants objected to any answer to said question, which objection the court sustained, and the plaintiffs excepted.

Whereupon the plaintiffs announced their case closed.

95 The defendants gave in evidence the following deed.

This indenture, made this twenty-second day of March in the year of our Lord one thousand eight hundred and ninety-nine by and between Christina Weir, a widow, Mary R. Haig and Margaretta M. Haig, spinsters, Elezebeth Haig, widow, James Weir Haig and Clara Haig, his wife, Charles R. Haig, son of James and Anna F. Haig, his wife, William W. Haig, son of Thomas, unmarried; J. Frank Haig and Florence A. Haig, his wife; George R. Weir, widower; William Thomson Weir and Anna M. Weir, his wife; Elezabeth Weir, spinster, Deborah Ellis and Garret Ellis, her husband; Anna J. Frances and Jesse G. Frances, her husband, Flora Middleton Mueller and August H. Mueller, he- husband, Harry S. Middleton and Minnie L. Middleton, his wife; Christina Haig and Annie Haig, spinsters; Clarence B. Haig and Walter R. Haig, unmarried; Ida P. Plum; Mary Diblin and George A. Diblin, her husband; Laura Haig, spinster; Morris A. Haig and Jennie B. Haig, his wife, William Smith, widower individually and as guardian of Robert Clifford Smith; Robert Clifford Smith, unmarried; George W. Haig and Martha M. Haig, his wife; Mary Louisa Haig, spinster; William Thomson Haig and Lizzie H. Haig, his wife; Albert Haig and Maggie Haig, his wife; Electa S. Kramar and Henry Kramar, her husband; Charles R. Haig (son of Thomas) and Ella L. Haig, his wife; Jane H. Haig, widow of Thomas Haig and Sarah B. Haig, widow of James M. Haig, parties of the first part and Andrew C. Keeley of Philadelphia, trustee of the second part and Richard K. Paynter of the District of Columbia, party of the third part:

Whereas William Thomson, Junior, late United States consul to Great Britain, died intestate (as to the hereinafter-described real estate) and unmarried, leaving as his heirs-at-law the children and descendants of the children of his aunt Anna Haig, who was a sister to William Thomson Senior (father of the said William
96 Thomson Junior) having had six children, viz., Anna, James, Elezabeth Weir, Thomas, Christina Weir and John. Said Anna Haig the younger, died unmarried in 1854; said James Haig, son of Anna, died in 1878, leaving six children, viz., Mary R., Thomas, Margaretta M., Elezabeth, James Weir and Charles R., all of whom are now living and are parties hereto, except Thomas, who died prior to the death of William Thomson, Junior, leaving a widow, Jane H. Haig, and three children, viz., Charles R., J. Frank and William W. Haig, parties hereto. Said Elezabeth Weir died prior to the death of William Thomson, Junior, leaving four children, viz., George R. Weir, William Thomson Weir, Elezebeth Weir and Deborah Ellis, parties hereto. Said Thomas Haig, son of Anna, died in 1893, intestate as to any interest he had in the hereinafter-described property, leaving (Margaret his widow died in 1894) as his heirs-at-law, seven children, viz., Anna J. Frances, Ella Middleton, Christina Haig, James Haig, Ida P. Plum, George Haig and Mary Smith, the said Ella Middleton, daughter of Thomas Haig, died prior to her father, leaving two children, viz: Flora Middleton Mueller and Harry S.

Middleton, parties hereto. Said James W. Haig, son of Thomas died in 1897, intestate, leaving (Sarah B. Haig his widow) as his heirs-at-law three children viz., Annie Haig. Walter Haig and Clarance B. Haig, parties hereto. Said George Haig, son of Thomas, died in 1898, intestate, leaving (Elezabeth Haig, his widow, daughter of James Haig, and already a party hereto,) as his heirs-at-law three children, viz., Mary Diblin, Laura Haig and Morris A. Haig, parties herrto. Said Mary Smith, daughter of Thomas Haig, died, leaving as heirs-at-law William Smith, her husband, and Robert Clifford Smith, her son, parties hereto. The remainder of the children of the said Thomas Haig are parties hereto. Said Christina Weir, daughter of Ann Haig and aunt of William Thomson, Junior, aforesaid, is a party hereto. Said John Haig, son of Anna Haig, died in 1894, leaving five children, viz., George W., Mary Louise, William

97 And whereas the parties of the first part have sold one undivided fourth part of the real estate hereinafter described to said Richard K. Paynter, of the third part and believing it to be to their interest so to do have agreed to execute this deed.

Now therefore this indenture witnesseth: That the said parties of the first —, for and in consideration of ten dollars ($10.00), lawful money of the United States of America to them in hand paid by the parties of the second and third parts, the receipt of which before the sealing and delivery of these presents is hereby acknowledged, have given, granted and confirmed, and do by these presents, give, grant, bargain and sell, alien, enfeoff, release, convey and confirm unto the parties of the second and third parts as hereinafter set forth and described, their heirs and assigns forever, the following-described land and premises, situate, lying and being in the city of Washington, District of Columbia, and distinguished as follows: Sublot twenty-three (23) in square one hundred and sixty-six (166), together with all and singular the improvements, way-, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining, and all the estate, right, title, interest and claim either at law or in equity or otherwise however, of the parties of the first part, of, in, to or out of the said land and premises.

To have and to hold: the said land and premises and appurtenances unto and to the only use of the parties of the second and third parts, their heirs and assigns forever. That is to say, one undivided fourth part of the said real estate to the only use and benefit of the said Richard K. Paynter in his own right, and the remainder three-fourths part to the only use of said Andrew C. Keeley, his heirs and assigns, in and upon the following trust, viz., to rent, lease and collect the rents and profits from said property, to sue in

98 his own name, or to be sued into relation to same, and at any time to sell and convey said real estate or any part or parcel thereof, upon such terms and conditions as he the said Keeley may deem proper, and without liability on the part of the purchaser to see — the application of the purchase-money, and after paying the expenses attached to the execution of said trust, to di-

vide the proceeds arising from such sale or sales or rent of said property among the parties of the first part, their heirs and assigns according to their respective interests.

And the said parties of the first part hereby covenant and agree to and with the said parties of the second and third parts, their heirs and assigns, *and* they, the parties of the first part*l* their heirs and assigns, will, at any time hereafter upon the request of the parties of the second and third parts, their heirs and assigns, make, execute and deliver any further deed or deeds that may be necessary to fully transfer and convey the title to said real estate as the parties of the second and third parts, their heirs or assigns, or their counsel may require.

In testimony whereof, the parties of the first part have hereunto set their hands and seals on the day and year first above written.

All signatures and acknowledgments omitted.

99 Thereupon the defendam*t*s among others offered the following prayers and the same were granted and read to the jury, to each of which the plaintiffs excepted.

Defendants' 2nd Prayer.

The jury are instructed as matter of law, that if they find the will properly executed to pass read estate in this District, the plaintiffs are estopped from attempting to claim any interest o*g* theirs in said property, which may have descended to Thomas Haig or William Thomson Weir, and cannot attack the said will on the ground of undue influence or mental incapacity. It appears in this case that these two would be entitled to sixteen one-hundredths of said property, and as to that portion of said property they shall return a verdict for the defendants, if the jury so find that the will was duly executed to pass real estate in this District.

Defendants' 3rd Prayer.

The jury are instructed as matter of law, that the introduction of the will in this case by the defendants, and the testimony accompanying the same, constitute *prima facie* evidence that the said will was signed by William Thomson and -uly attested to pass real estate in the District of Columbia; and unless they find from the whole evidence that this presumption is rebutted, then their verdict must be for the defendants, unless they further find from a preponderance of the testimony that the said William Thomson had not testamentary capacity to make said will, and was not competent to execute a valid deed or contract at the time said will was made, or that said will was obtained through undue influence.

100 *Defendants' 4th Prayer.*

The jury are instructed that on the question of testamentary capacity, that unless the plaintiffs in this case have clearly proved by

a fair preponderance of the evidence, that the devisor, William Thomson, was, at the time of the execution of this will, a person of unsound mind, as defined by the court, their verdict must be for the defendants. They are further instructed as matter of law that to make a valid will, it is not necessary that the devisor should be endowed with a high order of intelligence and a perfect memory. If he possess memory and mind enough to know what property he owns and desires to dispose of, and the person or persons to who- he intended to give it, and the manner in which he wished it to be applied, and fully understood his purpose, and the business he was engaged in, he was, in contemplation of law, capable of making a valid deed or contract. In the District of Columbia, the capacity of a person to make a valid deed or contract, is the test of a capacity to make a will, and if, at the time that William Thomson made the will in question, he was of sound and disposing mind, that he could execute a valid deed or contract, then the will is valid, if you find the testator duly executed his will without being under any undue influence by others causing him to make his will in the way and manner in which it was executed.

Defendants' 6th Prayer.

The jury are instructed as matter of law, that the testamentary capacity of William Thomson, need only have existed at the time of the making of the will in question. The proof of such incapacity at any prior time, while it may furnish evidence reflecting upon the condition of the devisior's mind at the date of the said will,
101 it will not relieve the plaintiffs or parties assailing the will, from the necessity of establishing by a fair preponderance of all the evidence, the existance of mental incapacity or incompetency at the time of executing the paper. The devisior William Thomson had the right to make a will and dispose of his property as he pleased. Such right is among the dearest and most sacred rights of a citizen, is secured by law, and that right should not be impaired or qualified, except upon a substantial ground, or upon a fair preponderance of proof of mental incapacity at the time of the execution of the paper in question, or that he was unduly influenced to make the will contrary to what he would if left to himself.

Defendants' 7th Prayer.

The jury are instructed that while non-experts have been allowed to express their opinions as to the mental capacity or incapacity of William Thomson, the jury should consider the opportunities of such witnesses to know William Thomson, and the reasons upon which the witnesses rest their statements of opinion as to William Thomson's sanity or insanity; and they are further instructed that the opinion of a non-expert witness as to the mental condition of William Thomson, is worth nothing as evidence, unless supported by proof of facts and circumstances which, in the judgment of the

jury, justify the conclusions reached by them. They are further instructed that there is no evidence in this case, of any opinion of any non-expert witness that William Thomson was, at the time he made said will incapable of making a valid deed or contract; nor is there any statement of any non-expert witness as to the mental incapacity of William Thomson to make a valid deed or contract at the time said will was executed.

102 *Defendants' 8th Prayer.*

While the plaintiffs may prove undue influence sufficient to overcome the will in question by a variety of facts and circumstances, yet it is incumbent upon them seeking to set aside the will upon the ground of undue influence, to satisfy your minds that its execution was obtained by undue influence; but evidence which merely showed that opportunities may have existed for the exercise of undue influence, and which does not show to your satisfaction that any such influence was exercised, is not sufficient to set aside a will on the ground.

103 And thereupon the plaintiff- prayed the court to instruct the jury, as follows:

1st.

The question to be determined by you in this case is whether the instrument purporting to be the last will and testament of William Thomson, a copy of which has been admitted in evidence, is a valid disposition of the real estate in controversy, and involved in this question are three issues of fact, namely:

1st. Whether the said instrument was executed in due form of law.

2nd. And if so, whether the execution by William Thomson was procured by the exercise of undue influence over said Thomson by James E. Cunningham, one of the beneficiaries and one of the executors nominated in it or by any other person.

3rd. Whether said Thomson was at the time of the execution of same — sound and disposing mind and capable of executing a val-d deed or contract.

If you should find from the evidence and under the further instruction of the court as to each of these three issues, that said instrument was not executed in due form of law, or that its execution was obtained by undue influence or that said Thomson at the time of executing the same was not of sound and disposing mind and not capable of executing a valid deed or contract, then your verdict should be for the plaintiffs.

II.

Referring to the prayer numbered one and the first issue of fact mentioned in it, the court instructs you that the law of the District of Columbia requires that a devise of real estate, that is to say, a

disposition of the same by will shall be signed by the party making the will, and that the instrument shall be attested and sub-
104 scribed in the presence of such party by three or four credita-ble witnesses or else it shall be utterly void and of no effect. The person who subscribes a will as a witness should be satisfied from his own knowledge, of the state of the testator's mental capacity and that he is of sound and disposing mind and capable of executing a valid deed or contract.

The copy of the instrument purporting to be the will of said Thomson has been admitted in evidence upon proof of the death of John H. Cooksey and proof that the signature to the certificate on the margin of the instrument is in his handwriting; but if upon the whole evidence you should find that John H. Cooksey in signing the certificate did not intend thereby to become a subscribing witness thereto, or if you should find from the whole evidence that the said Cooksey did not in fact sign the said certificate in the presence of the testator, then and in either event the presumption of regularity in the execution arising upon the face of the certificate, and proof of Cooksey's death and handwriting is rebutted, and the execution of the said instrument is not sufficient in law, and your verdict should be for the plaintiffs; and in reaching a conclusion as to the intention of the said Cooksey in the premises, it is competent for you to consider among other facts the position of his signature and attach such weight thereto as in your judgment it should receive.

III.

Referring to prayer numbered one and to the second issue mentioned therein the jury are instructed that if they believe from the evidence that the execution of the said instrument by the said William Thomson, was procured by undue influence exercised over him by James E. Cunningham or by any other person, then said instrument was not his free act and deed and their verdict should be for the plaintiffs.

105 By undue influence is meant an influence exercised over the testator by another'- importunity, misrepresentation, craft, or deceit, with the intent to procure the execution of the will by him changing a disposition of his property already made by will or induce the testator to make a disposition of his property such as he would not have made otherwise; and in determining whether such undue influence was exercised in this case over the said Thomson, it is competent for the jury to consider whether at or about the time of the execution of the instrument in question or immediately before it, the said Cunningham or others had control of the person and affairs of the testator, and whether at his or their instance and by such importunity, misrepresentation, craft or deceit the said testator was induced to revoke a former will made by him and to execute said instrument whereby the original objects of his bounty were cut off from the benefits first intended by him for them and another and different disposition was made of his estate whereby the said

Cunningham and his family became beneficiaries in the disposition of said estate.

The jury are further instructed that in order to establish that the alleged will was procured by undue influence, it is not necessary that such influence should be proved by direct evidence, but to determine that question they are to consider all the evidence in the case bearing upon that subject, including what took place before and after the execution of the will, and thereafter to the death of said William Thomson, including the provisions of the will itself; and if they find the fact to be that by the alleged will nothing is given to persons who were beneficiaries under a former will, such fact and the position of proximity of the parties benefited by
106 said alleged will to the place of abode of said William Thomson and opportunities afforded by reason of their being
107 near him, and the age and enfeebled state of the health of said Thomson should be taken into consideration with all the other evidence in the case in determining the question of undue influence.

IV.

The jury are instructed that the law of this District requires a testator, when making a will to be of sound and disposing mind and capable of executing a valid deed or contract; a sound mind signifies a mind whole, unbroken, unimpaired by desease or otherwise; a disposing mind is a mind which has the capacity of recollecting, discovery and feeling the relations and connections of family and blood; and if you find from the evidence that within two or three months prior to the date of said instrument, namely, February 24th 1886, the testator was insane or of unsound or impaired mind and not capable of making a valid deed or contract, the presumptions are that such unsoundness of mind continued and it — upon the defendants, claiming under the will to satisfy you by a preponderance of the evidence that at the date of the execution of the will, he was in full control of all his mental faculties, knowing the extent and value of his property and the persons who were the natural objects of his bounty and their deserts, with reference to their conduct to him and their relative claims and necessities; and if you find that he did not know or understand all of such matters and things fully and clearly, then your verdicts should be for the plaintiff.

V.

The jury are further instructed that because a person can correspond with a friend or relative intelligently and carry on or attend to ordinary business matters, does not necessarily show that he is of sound and disposing mind and capable of making a will.
108 That in considering the question of his mental capacity, they should take into consideration all the surroundings as disclosed by the evidence, the age of said Thomson and the insanity of his mother and uncle and the age at which they were effected. The witnesses to the will were apparently strangers to the testator,

and therefore not capable of judging of his mental capacity, so well as one who knew him, a friend or intelligent servant for instance, who had known him for years; persons of unsound mind often suc-eed in controlling their actions to such an extent that all their outward appearances are rational and often their malady is not only successfully concealed from non-professional observers but from the experienced eyes of physicians.

VI.

If the jury find from the evidence that William Thomson signed an instrument purporting to be his last will and testament at the end thereof, and over his said signature he states that the instrument so signed consisted of two sheets of paper and that he had signed each of said sheets; and if the jury find from other evidence in the case that the said William Thomson did in fact sign his name to said sheets; and if they further find that the copy of the instrument produced by the defendants and given in evidence does not show such signatures of him, the said William Thomson, as to one of said sheets, then the jury may infer from said fact that the instrument of which such copy has been so produced and given in evidence is not in fact the same instrument so signed by said Thomson; and if the jury should so find, their verdict should be for the plaintiffs.

VII.

The jury are instructed that the instructions given them by the court are for their guidance as to the application of principles
109 of law to the evidence submitted to them, and it is their exclusive right to judge of the credi*ta*bility of the witnesses and to weigh all the testimony or evidence tending to prove or dis*a*prove the facts relied upon by either the plaintiff- or defendants to this case.

VIII.

The jury are instructed that there is no evidence in this case to show any wrongful act of the plaintiffs in acquiring the title to the land in question, and anything said by counsel tend*ed* to show such wrongful acquisition must be disregarded.

The court refused to grant prayer No. 3 as offered by the plaintiffs, but granted the same as modified.

See prayer III, set out in the court's charge.

To which modification the plaintiffs excepted.

The court refused to grant prayer No. V of the plaintiffs as offered, but gave in lieu thereof, prayer V as set out in the charge.

To which modification the plaintiffs excepted.

The court refused to grant prayer No. VI and the plaintiffs excepted.

The court refused to grant prayer No. VIII and the plaintiffs excepted.

Thereupon the court charged the jury and read the prayers offered.

110 "GENTLEMEN OF THE JURY: This is an action by Andrew C. Keeley, trustee, Richard K. Paynter, plaintiffs, against Joseph H. Moore, Edward J. Stellwagen and Thomas J. Fisher, trading as Thomas J. Fisher and Company.

The plaintiffs Andrew C. Keeley trustee and Richard K. Paynter sue the defendants to recover the possession of the undivided ninety-one one-hundredths part of all that certain piece of parcel of land and premises situated lying and being in Washington, District of Columbia and being known and described as lot number twenty-three (23) in Samuel Davidson's subdivision of lots in square numbered one hundred and sixty-six (166) in which the plaintiffs claim an estate in fee-simple and of which they were lawfully seized and possessed, to wit, on the first day of June, 1899, when the defendants entered the same and unlawfully ejected the plaintiffs therefrom and from thence hitherto unlawfully detained and still continue to detain the same from the plaintiffs.

And the plaintiffs claim possession of the said undivided part of the said real estate and premises with the appurtenances, besides the costs of this suit.

And secondly, the plaintiffs sues the defendants in an action for rent and mesne profits, *for* payable by the defendants to the plaintiffs, for that the defendants, on, to wit the first day of June, 1899, unlawfully ejected the plaintiffs from the real estate described in the first part of this declaration, to wit: the undivided ninety-one hundredths (91/100) part of lot numbered 23 in Samuel Davidson's subdivision of lots in square numbered 166 of which they claim an estate in fee-simple of which they were lawfully seized and possessed on the aforesaid day which the defendants have since that date detained and still continue to detain and unlawfully occupy to the great damage *and still continue to detain and unlawfully*
111 *occupy to the great damage* and injury of the plaintiffs in the sum of three thousand dollars and the plaintiffs claim the sum of three thousand dollars besides their costs, and pray judgment accordingly."

"That gentlemen, is the declaration of the plaintiffs in this action."

"It appears that a petition was filed as follows:"

"Petition of Mary Cecelia Thomson and Georgiana Hawks Thomson through their attorneys Lambert and Lambert, respectfully represent- to the court as follows:

First. That they are entitled to and own the property in litigation in the above-entitled cause.

Second. The defendants above named are real-estate agents in the city of Washington, District of Columbia, and are agents for petitioners in the management and rental of the aforesaid property and are not otherwise interested in the same.

Wherefore petitioners pray to be allowed to intervene in this cause and to be made parties defendants hereto.

(Signed) LAMBERT AND LAMBERT.

And on the margin is:

I consent that the petitioners may be made defendants, but not to release present defendants.

(Signed) LEO SIMMONS,
Attorney for Plaintiffs."

"The court having granted this petition the petitioners became defendants in this cause and filed, I understand, a plea of not guilty to the declaration. That creates the issue between the parties to be tried."

"But in the course of the trial, it was early in the trial developed so far as the plaintiffs are concerned, that they held and claimed to hold the property and have the title to it by virtue of a deed which had been executed to them by parties who were shown to be the heirs of William Thomson."

112 "Thereupon the defendants, after taking testimony, produced *in* instrument which was claimed to be the last will and testament of William Thomson, deceased, by which it was claimed there was devised to the defendant petitioners who came into the case upon petition, the property as described in the declaration."

"Certain proofs as to the execution of the will were admitted to the court and jury by the court and thereupon upon the motion of the defendants who are petitioners who are made to intervene here and the motion of the defendants represented by the counsel for the defendants, the court admitted the will to go in evidence as having been *prima facie* proved to be the will executed so as to conform to the laws of the District of Columbia, so as to pass the title to real estate by will, subject to any testimony that might be produced by the plaintiffs contradicting the testimony upon which the will had — introduced on the part of the defendants and which was held by the court to be sufficient *prima facie* to entitle the will to go in evidence."

"I hardly need to recall the testimony. It was the testimony of the witnesses to the will, that was introduced by the defendants together with some papers and matters connected with the will itself showing its execution."

"Thereupon the plaintiffs introduced testimony to establish, first, as they claim, that the will was not executed according to the law of the District of Columbia so as to pass real estate in the District of Columbia. It was claimed by the plaintiffs and is now claimed before you, that only two witnesses signed the will as witnesses to the will and to the execution of the will, and that the third name which appears on the will, the name of Cooksey was not placed there as a witness to the will and could not therefore be considered as witness to the will, and it is claimed by counsel for the plaintiffs that because of that fact this will ought not to be regarded by

113 the jury as a valid will to pass real estate in this District."

"Further, plaintiffs introduced evidence which they claim reflects upon the sanity of the testator at the time when he executed the will, which they claim shows that he was not at time of the

execution of this will of sound mind and capable of making a valid deed or contract which by the law of this District is made the test of the qualification of a testator to make a will, of his competency to make a will."

"They further introduce evidence which they claim reflects—and that there is evidence in the case to which allusion has been made by counsel in argument—that reflects upon the question as to whether he executed the will of his own volition and according to his own desire or whether he was wrongfully and fraudulently influenced by some person to execute a will contrary to his own desire and purpose when left to himself."

"Evidence has been admitted, some evidence after the plaintiffs closed, as to these three matters of defence against the will, namely, that it was not properly executed that the testator was not of sound mind when he executed it, and that he was unduly and wrongfully influenced to make the will by some other person than himself."

"After having given evidence of these three defences as I remarked, the defendants introduced some rebutting testimony. I make this statement so that it will bring if possible to your minds a clear consideration of the status of the case, of what the questions are and the order in which they have been presented and are to be looked at by the jury in the consideration of the verdict they must render."

114 "Sundry prayers have been presented to the court by each of the parties, and some have been granted and some disapproved, and those that have been granted I propose to bring to your attention in as good order as I can, making such explanations as seem to be *to be* proper of anything that I think an explanation should be made."

Defendants' II Prayer.

"The jury are instructed as matter of law, that if they find the will properly executed to pass real estate in this District, the plaintiffs are estopped from attempting to claim any interest of theirs in said property, which may have descended to Thomas Haig or William Thomson Weir, and cannot attack the said will on the ground of undue influence or mental incapacity. It appears in this case that these two would be entitled to sixteen one-hundredths of said property, and as to that portion of said property they shall return a verdict for the defendants, if the jury so find that the will was duly executed to pass real estate in this District."

"And in relation to that matter, gentlemen, it is not only competent for you to consider the fact as to the position of the signature but all other facts surrounding the paper itself. The declaration of the party Cooksy, who makes the certificate, as to its being acknowledged by the party coming before him and acknowledging the instrument to be his last will and testament and that it is his signature thereto. And as to what may be presumed from those facts what the import or significance of those facts may be or what may have

been said that has been placed in evidence and whatever may have been said by the testator himself in relation to acknowledging this paper before Cooksey—that is all in evidence and should be considered by you in determining in what capacity this was signed by Cooksey, whether he signed it as a mere perfunctory performance as acknowledging the signature on the will before him, or whether the testator had some purpose in making that acknowledgment to secure the signature of Cooksey, all that is matter for you to determine and consider all this that is in evidence, and its import is to be left to you to determine as to what it tended to prove."

115 "By admitting this evidence we have approved it as competent; but as to the weight and import of evidence of that description your attention has been called by counsel in their argument and is now called by the court that it is for you to say what weight and import shall be given to the acts and language that you may find in connection with the will itself and proof of the will itself and the certificate upon it and in connection with the proof of what the testator may have said in relation to this will so far as that is in evidence."

Mr. BAKER: But this evidence is only to be used to rebut the presumption——

The COURT: Well that will appear very clearly from the charge. It is the evidence of this character that is introduced tending to show as it is claimed by counsel for the plaintiffs that the signatures of Cooksey is not there as a witness to the will. And this evidence is asmitted for the purpose of rebutting the presumption which the court has held and has charged you already has been admitted to you upon the proof of the death of Cooksey and proof of the genuineness of his signature as *prima facie* competent and proper to pass and sufficient to pass real estate in the District of Columbia but only *prima facie* sufficient, the plaintiffs having the right to rebut the presumption, and the evidence which is referred to in this prayer which has been given to you as coming from the plaintiffs is evidence which ought to be considered by you in reference to that question; whether that presumption is correct or not, whether the facts are sufficient to overcome the presumption of the fact that the purpose of Cooksey was not to be a witness, but was for some other purpose, and was not signed by Cooksey as a witness nor his signature secured on the part of the testator for that purpose, and also the question whether the evidence shows whether the testator was present at the time Cooksey signed the paper.

116 *Defendants' III Prayer.*

"The jury are instructed as matter of law, that the introduction of the will in this case by the defendants, and the testimony accompanying the same, constitute *prima facie* evidence that the said will was signed by William Thomson and duly attested to pass real estate in the District of Columbia; and unless they find from the whole evidence that this presumption is rebutted then their verdict

must be for the defendants, unless they further find from a preponderance of the testimony that the said William Thomson had not the testamentary capacity to make said will, and was not competent to execute a valid deed or contract at the time that the same was made, or that said will was obtained through undue influence."

"That prayer is understood by the jury and does not need any explanation. It is in accord with the statement which I have made in stating the history of the case as it is presented to you in this court, and is in relation to the first defence made by the plaintiffs as against the will, namely, as to the proper proof having been given of the due execution of that will to pass real estate in the District of Columbia, and it is stated that the will as introduced is *prima facie* evidence of that proof having been made, and
117 that unless it is rebutted by the testimony of the plaintiffs in that respect and it is not shown that the testator was of unsound mind at the time he executed the will and that he was induced to make the will by any undue influence. If those things are shown by the whole evidence in the case, then the defendants are entitled to your verdict."

"The fourth prayer of the defendants in the case who support the will and claim under the will, as modified by the court is as follows and is given to you as the law relating to your duty in this case:"

Defendants' IV Prayer.

"The jury are instructed that on the question of testamentary capacity, that unless the plaintiffs in this case have clearly proved by a fair preponderance of the evidence, that the devisor, William Thomson, was, at the time of the execution of this will, a person of unsound mind, as defined by the court, their verdict must be for the defendants. They are further instructed as matter of law, that to make a valid will, it is not necessary that the devisior should be endowed with a high order of intelligence and a perfect memory. If he possess memory and mind enough to know what property he owns and desires to dispose of, and the person or persons to who he intended to give it, and the manner in which he wished it to be applied, and fully understood his purpose, and the business he was engaged in, he was, in contemplation of law, capable of making a valid deed or contract." * * *

"And that being the test in this District would be also regarded as showing capacity of making a valid will in this case."

(His honor then continued the reading of the IV prayer, as follows:)

"In the District of Columbia, the capacity of a a person to make a valid deed or contract, is the test of a capacity to make a will, and if, at the time that William Thomson made the will in question, he was of such sound and disposing mind, that he could execute a valid deed or contract, then the will is valid, if you find the testator duly executed his will without being under any undue influence by others causing him to make his will in the way and manner in which it was executed."

118 *Defendants' VI Prayer.*

"The jury are instructed as matter of law, that the testamentary capacity of William Thomson, need only have existed at the time of the making of the will in question. The proof of such incapacity at any prior time, while it may furnish evidence reflecting upon the condition of the devisor's mind at the date of the said will, will not relieve the plaintiffs or parties assailing the will, from the necessity of establishing by a fair preponderance of all the evidence, the existance of mental incapacity or incompetency at the time of executing the paper. The devisor, William Thomson had the right to make a will and dispose of his property as he pleased. Such right is among the dearest and most sacred rights of a citizen, is secured by law, and that right should not be impaired or qualified except upon a substantial ground, or upon a fair preponderance of proof of mental incompetency at the time of the execution of the paper in question, or that he was unduly influenced to make the will contrary to what he would if left to himself."

"It is undoubtedly true gentlemen, I may say to you in commenting upon that prayer which I give, that a man here in this District or elsewhere owning property here may make a will and dispose of his property as he pleases, the only thing to be inquired into is whether he executes a will in proper form, legal form, whether he was capable mentally of understanding what he was doing, whether he knew and had sufficient mind to know who were the objects of his bounty and to whom he wished to give his property *to*, and what his property was, what it consisted of, where it was and the disposition he wished to make of it. If he had that much of capacity, understood the business he was engaged in and was not unduly influenced by any other person to make the will, then this will should stand."

Defendants' VII Prayer.

"The jury are instructed that while non-experts have been allowed to express their opinions as to the mental capacity or incapacity of William Thomson, the jury should consider the opportunities of such witnesses to know William Thomson, and the reasons upon which the witnesses rest their statements of opinion as to William Thomson's sanity or insanity; and they are further instructed that the opinion of a non-expert witness as to the
119 mental condition of William Thomson, is worth nothing as evidence, unless supported by proof of facts and circumstances which, in the judgment of the jury, justify the conclusions reached by them. They are further instructed that there is no evidence in this case, of any opinion of any non-expert witness that William Thomson was, at the time he made said will incapable of making a valid deed or contract; nor is there any statement of any non-expert witness as to the mental incapacity of William Thomson to make a valid deed or contract at the time said will was executed."

"You will understand that this instruction, the latter part of it, relates to the very time of the execution of the will, and that no non-expert witness has testified that he was incompetent or insane or not capable of making a will at the very time of its execution. It does not follow, I should caution you, however that there is no evidence in the case which it is not proper for you to take into consideration in reference to the question whether he was not of unsound mind *and* the very time he executed the will*l*. Evidence has been introduced of non-expert witnesses as to his condition of mind and conduct previous to the execution of the will, and the fact which does not seem to be disputed at all that he was insane before that time, before the execution of the will and was taken to a private asylum and kept there for a time disclosed by the evidence and therefore that is competent testimony to be taken into consideration in reference to the matter. And in relation to that kind of testimony I shall have occasion to say something further before the conclusion of this charge, but will say nothing more now, but merely to call your attention to what is meant by this instruction which I have read to you."

Defendants' VIII Prayer.

"While the plaintiffs may prove undue influence sufficient to overcome the will in question by a variety of facts and circumstances, yet it is incumbent upon them, seeking to set the will
120 aside upon the ground of undue influence, to satisfy your minds thats its execution was obtained by undue influence; but evidence which merely showed that opportunities may have existed for the exercise *if* undue influence, and which does not show to your satisfaction that any such influence was exercised, is not sufficient to set aside a will on that ground."

"I may say to you now perhaps that undue influence in a case when offered as to the execution of a will is a fact to be proved by the party alleging it just as any other fact is to be proved that may be essential to be established in any case."

"It is not to be taken for granted, it must rest upon evidence which in the judgment of the jury satisfactorily establishes that undue influence was exercised. It would not be sufficient merely that it is suspected to have been exercised, it should not show merely that some parties had the opportunity to exercise the undue influence it would not be sufficient to prove that there was a motive on the part of some parties to cause the testator against his will and by fraud, deceit or misrepresentation or control over the testator to cause him to make a will different from what he would have made if left to himself."

"While these matters may be given to you in evidence for the purpose of enabling you to see the situation how the parties were related and connected and how the testator might be effected, while it is competent for that and for the purpose of proving in connection with other facts, that undue influence was in fact exerted, yet as we

have said to you in this prayer if they only show that parties had only an opportunity to exercise undue influence or had a motive for doing it, yet if nothing more is shown indicating that undue influence was in fact used and exercised, if from a view of all the evidence in this case it is not shown to your satisfaction by a preponderance of the evidence that undue influence was exercised, the will should stand."

121 *Plaintiffs' I Prayer.*

"The question to be determined by you in this case is whether the instrument purporting to be the last will and testament of William Thomson, a copy of which has been admitted in evidence, is a valid disposition of the real estate in controversy, and involved in this question are three issues of fact, namely:

1st. Whether the said instrument was executed in due form of law.

2nd. And if so, whether the execution by William Thomson was procured by the exercise of undue influence over said Thomson by James E. Cunningham, one of the beneficiaries, and one of the executors nominated in it or by any other person.

3rd. Whether said Thomson was at the time of the execution of same of sound and disposing mind and capable of executing a valid deed or contract.

If you should find upon the evidence and under the further instruction of the court as to each of these three issues, that said instrument was not executed in due form of law, or that its execution was obtained by such undue influence, or that said Thomson at the time of executing same was not of sound and disposing mind and not capable of executing a valid deed or contract, then your verdict should be for the plaintiffs."

Plaintiffs' II Prayer.

"Referring to the prayer numbered one and the issue of fact mentioned in it, the court instructs you, that the law of the District of Columbia requires that a devise of real estate, that is to say, a disposition of the same by will shall be signed by the party making the will, and that the instrument shall be attested and subscribed in the presence of such party by three or four creditable witnesses or else it shall be utterly void and of no effect. The person who subscribes a will as a witness shall be satisfied from his own knowledge, of the state of the testator's mental capacity and that he is of sound and disposing mind and capable of executing a valid deed of contract. The copy of the instrument purporting to be the will of said Thomson has been admitted in evidence upon proof of the death of John H. Cooksey, and proof that the signature to the certificate on the margin of the instr-ment *in* in his handwriting; but if upon the whole evidence you should find that John H. Cooksey in signing the certificate did not intend thereby to become a sub-

scribing witness to the instrument, and that the testator did not intend that the said Cooksey should thereby become a subscribing witness thereto, or if you should find from the whole evidence that the said Cooksey did not in fact sign the said certificate in the presence of the testator, then and in either event the presumption of regularity in the execution arising upon the face of the certificate and proof of Cooksey's death and handwriting is rebutted, and the execution of the said instrument is not sufficient in law and your verdict should be for the plaintiffs; and in reaching a conclusion as to the intention of the said Cooksey in the premises, it is competent for you to consider among other facts the position of his
122 signature and attach such weight thereto as in your judgment it should receive."

"The third prayer of the plaintiffs which with some modification is given to you as the law, is as follows."

Plaintiffs' III Prayer.

"Referring to prayer numbered one and to the second issue mentioned therein the jury are instructed that if they believe from the evidence that the execution of the said instrument by the said William Thomson was procured by undue influence exercised over him by James E. Cunningham or by any other person, then said instrument was not his free act and deed and their verdict should be for the plaintiffs.

By undue influence is meant an influence exercised over the testator by another through importunity, misrepresentation, craft or deceit, with the intent to induce the testator to make a disposition of his property such as he would not have made if left to himself and in determining whether such undue influence was exercised in this case over the said Thomson, it is competent for the jury to consider whether at or about the time of the execution of the instrument in question or immediately before it, the said Cunningham or others had control of the affairs and person of the testator, and whether at his or their instance and by such importunity, misrepresentation, craft or deceit, the said testator was induced to revoke a former will made by him and to execute said instrument whereby the original objects of his bounty were cut off from the benefits first intended by him for them and another and different disposition was made of his estate whereby the said Cunningham and his family became beneficiaries in the disposition of said estate.

The jury are further instructed that in order to establish that the alleged will was procured by undue influence, it is not necessary that such influence should be proved by direct evidence, but to determine that question, they are to consider all the evidence in the case bearing upon that subject, including what took place before and after the execution of the will, and thereafter the death of said William Thomson, including the provisions of the will itself; and if they find the fact to be that by the alleged will nothing is given to persons who were beneficiaries under a former will, such fact and

the position or proximity of the parties benefited by said alleged will to the place of abode of said William Thomson and opportunities afforded by reason of their being near him, and the age and enfeebled state of the health of said Thomson should be taken into consideration with all the other evidence in the case in determining the question of undue influence, and given such weight, if any, as the jury may deem just and proper."

"As I have already saod to you the question of undue influence is a question of fact to be proven and it may be proven by circumstantial evidence if in the opinion of the jury that circum-
123 stantial evidence is of such a pointed and important character as to satisfy them by a preponderance of evidence that undue influence was in fact exercised by these persons charged with having done so on the mind and purpose of the testator to the extent that it effected his will, that it molded his will in a shape different from that which he would have made it, had he been left to himself, or whether any fraud or unfair means had been used which would have been sufficient to constitute unfairness, had been exercised upon him."

"Now, when a will is executed through friendship or even through entreaty or importunity, if the testator is of sound mind and has the capacity to make a will, and if no unfair means or misrepresentations are used to induce him to make a will in the form in which he does, or if he yields merely to argument or to an appeal to his affections for the persons in whose favor the will may be made or to an appeal to his senses of justice, if he be of sound mind and capable of weighing the argument and the supplications and petitions that are made to him, he may grant them if he pleases without any reference to the obligations he may be under to anybody. He may make a very unjust will, which in the judgment of the jury or in my judgment may be unjust all the circumstances considered, yet if he was of sound mind capable of understanding the business he was about and what he wanted to do with his property he had the right to make any disposition that he chose even to the extent of ignoring all his relatives and giving his property to strangers.

Men as a general thing do not do that, and when the question is one of undue influence exercised upon the testator, it is proper to look at the will to see if it is a just will, whether it is a natural will
or not for him to make, and that is simply a circumstance to
124 be considered one of the surrounding circumstances which the jury are to take into consideration in their consideration of all the evidence in the case that may bear upon the subject, and determine from that whether they are satisfied whether the will is the result of undue influence and wrongful influence exercised upon the testator and which caused him to make a will contrary to his own purposes if he had been left to himself."

"It follows then that undue influence in order to be sufficient to set aside a will must be an influence wrongfully exerted upon the testator, dishonestly exercised, fraudulently exerted, and not the re-

sult of bringing to the mind of the testator absolute and actual facts as they exist and honest appeals to him to exercise his generosity to particular persons. Of course if the testator is not of sound mind that is another question. He is not capable of making a will himself then and it would be set aside, for that reason and not for the reason of undue influence exercised as well as the unsoundness of mind."

"The fourth prayer of the plaintiffs is as follows and as modified by the court is given to you as the law, which is to govern you in rendering your verdict."

Plaintiffs' IV Prayer.

"The jury are instructed that the law of this District requires a testator, when making a will, to be of sound and disposing mind and capable of executing a valid deed or contract; a sound mind signifies a mind whole, unbroken, unimpaired by desease or otherwise; a disposing mind is a mind which has the capacity of recollecting, discerning and feeling the relations and connections of family and blood; and if you find from the evidence that within two or three months prior to the date of said instrument, namely, February 24th 1886, the testator was insane or of unsound or impaired mind and not capable of making a valid deed or contract, (and that such insanity was permanent in its nature and character), the presumptions are that such unsoundness of mind continued and it in such case is upon the defendants, claiming under the will to satisfy you by a preponderance of the evidence that at the date of the execution of the will, (he was of sound and disposing mind capable of executing a valid deed or contract) knowing the
125 extent and value of his property and the persons who were the natural objects of his bounty and their deserts, with reference to their conduct toward him and their relative claims and necessities; (and if you find that he was not capable of knowing or understanding all of such matters and things, then your verdict should be for the plaintiffs."

"This is to be taken with what I have already said to you upon what degree of soundness of mind or degree of mental capacity is sufficient to enable a person to make a last will and testament. It is recited here perhaps with more definiteness and in some respects in a more general way than what I have already explained to you, but you may take this as being consistent with what I have already said to you in relation to the degree of mental ability the testator must have in order to make a valid will."

"The fifth prayer of the plaintiffs is given to you as follows as modified by the court ans is the law."

Plaintiffs' V Prayer.

"The jury are further instructed that because a person can correspond with a friend or relative intelligently and carry on or attend

to ordinary business matters, does not necessarily show that he is of sound and disposing mind and capable of making a will, (but such evidence is competent and may properly be considered by the jury as tending to show that he has such sound and disposing mind.) That in considering the question of his mental capacity, they should take into consideration all the surroundings as disclosed by the evidence."

"The seventh of the plaintiffs' prayers is as follows and is granted by the court as the law which will guide you in this case."

Plaintiffs' VII Prayer.

"The jury are instructed that the instructions given them by the court are for their guidance as to the application of principles of law to the evidence submitted to them, and it is their exclusive right to judge of the credibility of the witnesses and to weigh all the testimony or evidence tending to prove or disprove the facts relied upon by either the plaintiffs or defendants in this case."

126 Gentlemen of the jury, I congratulate you upon the close of the testimony in this case which is an important case, however, and required your careful consideration and attention. It is not entirely free from complications and will require care on your part in order to arrive at a proper conclusion and a just conclusion in relation to all the subject-matters which have been called to your attention and the decision and determination of which now rest with you.

The court has performed its duty as best it can in the course of the trial in the admission of testimony proper as it believed to go to the jury to be considered in this case, and has instructed you as to your duty in considering the various questions that are raised in the case and it now rests with you to determine all of these matters and to render your verdict accordingly.

Mr. SIMMONS: We have no exceptions——

Mr. TAGGART: You offered an exception to anything in conflict with the prayers that were refused.

Mr. BAKER: And also to the admission of the prayers of the plaintiff-.

The COURT: You except to the admission of the prayers of the plaintiff-. Is that all gentlemen? (To the jury:) You may retire. Is there any objection to the jury going to their lunch & your considering this case?

Mr. BAKER, Mr. SIMMONS & Mr. TAGGART: Oh, not the slightest.

The jury thereupon retired.

127 Whereupon the jury retired and returned a verdict for the defendants; and within four days thereafter the plaintiffs filed a motion for a new trial upon the following grounds:

Now come the plaintiffs and move the court to set aside the verdict and grant them a new trial upon the following grounds:

1st. Because of errors of law committed by the court in the trial of the case to which exceptions were duly noted by the plaintiffs.

2nd. Because the court erred in submitting the case to the jury upon the question of the proper execution of the will in ques-
128 tion, there being no evidence to be weighed or considered by them.

3. Because the court erred in refusing to admit certain evidence offered by the plaintiffs and in admitting evidence of the defendants over the objection of the plaintiffs.

4. Because the court erred in its instruction to the jury and in granting the prayers submitted by the defendants.

5. Because the court erred in refusing to grant certain prayers offered by the plaintiffs and in modifying others instead of granting them as offered.

6. Because the attorneys for the defendants in their opening statement and argument were allowed over objections of the plaintiffs to abuse the plaintiffs and their grantees and accuse them of wrongdoing, calling them "thieves and robbers," when there was no evidence of any character to warrant or authorize such argument or conclusion.

7. Because of the misconduct of certain members of the jury, namely, being asleep and intoxicated at the time the court was delivering its charge and instruction to them and of which neither the plaintiffs nor their attorneys had any knowledge.

8. Because one of the jurymen was under the influence of liquor, and was drunk and incompetent at the time they considered and rendered the verdict, of all of which neither the plaintiffs nor their attorneys had any knowledge.

9. Because one of the jurymen made notes of the trial without the knowledge of the court or the plaintiffs' attorneys and read them to the jury before and while considering their verdict.

10. Because the verdict is contrary to law.

11. Because the verdict is contrary to the evidence.

12. Because the verdict is contrary to the great weight of the evidence and was, therefore, unwarranted.

128½ And in support thereof the plaintiffs offered the following affidavits:

DISTRICT OF COLUMBIA, *ss:*

Personally appeared Everett Dufour and being duly sworn says he is a resident of the District of Columbia and is employed as an assistant ticket agent for the Baltimore and Ohio Railroad Company.

That on the morning of the 4th of February, 1902, he was present in circuit court No. 1 of the supreme court of the District of Columbia and while waiting to see a friend, who was engaged as stenographer in the trial of a case then on hearing, his attention was attracted by the condition of one of the jurors sitting in said case, a colored man in the first row near the west end of jury-box. That he entered said court about half an hour before the judge finished the instruction to the jury and before said jury re-

tired; and did not leave until the court took a recess and said jury had retired as aforesaid; that during the whole of the time affiant was in court and while said instructions were being given, said juror was apparently sound asleep and in a stupor from some cause; and when said jury left the box the juror in question had to be aroused by some of his associates. Affiant being a law student now in the senior class *and* naturally watched the conditions of affairs and proceeding.

EVERETT DUFOUR.

Subscribed and sworn to before me this 7th day of February, 1902.

CORCORAN THOM,
[NOTARY SEAL.] *Notary Public.*

129 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me Robert P. Searcy and being duly sworn says:

That he was one of the jurors in the case of Keely *et al. vs.* Moore *et al.* that took place in circuit court No. 1 before Chief Justice Bingham and ended February 4th 1902.

That in justice to himself and the parties to said suit he deems it his duty to make the following statement, viz: On the night of February 3rd he was kept up and awake near the entire night by reason of sickness in affiant's family. That not being well next morning himself he did not take any breakfast; that prior to his going to the court, thinking that it would tend to brace him up, he took a drink of whiskey, and on reaching the court, and about an hour after entering the jury-box, the effect of the liquor and the hot room caused him to become so drowsy he could not refrain from sleep and consequently did not hear all of the instructions or charges of the judge and knew nothing that transpired there until aroused when the jury was about to retire.

That when he went out and before going to the jury-room, he again took another drink and smoked and on reaching the jury-room he was in no condition to take part in the voting of the jury and does not know what transpired or what he did, the liquor having taken such effect upon him.

And further affiant sayeth not.

ROBERT P. SEARCY, *Affiant.*

Sworn and subscribed to before me this 6th day of February, 1902.

AYLETT T. HOLTZMAN,
[NOTARY SEAL.] *Notary Public.*

130 DISTRICT OF COLUMBIA, *ss:*

Personally appeared William N. Horstkamp and being duly sworn says, he was one of the jurors impaneled in the case of Keeley *et al.*

vs. Moore *et al.* that began January 22nd and ended February 4th 1902 in circuit court No. 1 before Chief Justice Bingham. That on the last day of the trial while the judge was giving the instruction, one of the jurors, a colored man by the name of Searcy was asleep and in an apparent stupor the entire time and had to be aroused when the jury retired. That when in the corridor of the court, before going to the jury-room one of the bailiffs handed one of the jurors a typewritten paper to take with them to the jury-room. That on reaching the jury-room the said Searcy was in an apparent intoxicated condition and proceeded to make an incoherent and rambling speech. That some of the men attempted to stop him but it was suggested that "he be left alone as he was drunk and would soon talk himself out." I also noticed plainly that said Searcy was under the influence of liquor before he went into the jury-box on the morning of February 4th.

WILLIAM N. HORSTKAMP.

Subscribed and sworn to before me this 7th day of February, 1902.

CORCORAN THOM,
Notary Public.

[NOTARY SEAL.]

131 DISTRICT OF COLUMBIA, *ss:*

Personally appeared John R. Ferris and being duly sworn, says, he was one of the jurors that were impaneled in the trial of the case of Keeley *et al. vs.* Moore *et al.*, that lately took place in circuit court No. 1 before Chief Justice Bingham. That on the last day of the trial and while the judge was delivering the instruction and charge one of the jurors, a man by the name of Searcy was in an apparent stupor, which affiant believes was from intoxication. That said juror remained in such stupor during the whole time said instruction was being given notwithstanding others of the jurymen attempted to arouse him several times but they did not succeed in doing so until the jury was retiring.

That while in the corridor, before going to the jury-room, a typewritten paper was handed to one of the jurymen, the affiant did not know for what purpose the paper was, but it was carried upstairs and laid on a table in the room for the jury to read and was read by them. That when the jurors reached the room, said Searcy proceeded to make a rambling and incoherent speech, some of the men remonstrated with him and tried to stop him and it was suggested that he be allowed to talk, that "he was drunk and would soon have his talk out." That after said Searcy finished his "speech" he returned to one side of the room, sat down again and seemed to fall into a comatose or stupid condition and it must have clearly appeared to all that the man was under the influence of liquor and not in a condition to know the responsibility resting upon him.

That soon after a foreman was selected and before a vote was taken a man by the name of Thomas took from his pocket one or more sheets of paper or a pocket-worn memorandum book contain-

ing written matter and proceeded to read same to the jurors,
132 saying that he had prepared them from time to time since the beginning of the trial.

Affiant further says, it was the opinion of some of the men, even those who never voted but one way, that the man Thomson, who made the will that was involved, was not of sound mind when he did so; there was a motion for a vote upon the question of sanity and when the voting was near through some of the jurors urged that the vote be abandoned and a vote taken for or against the defendants. Affiant finally acquiesced in the verdict, firmly believing it was most unjust and contrary to the evidence but only did so because it was absolutely necessary that he should reach his place of business as soon as possible, and believing that it would do no good to hold out, affiant never having been on a jury before and firmly believing that he would be censured by the court for holding out longer.

When the jury reached the jury-room it was urged that we get through in time to reach home or our place of business at 3 o'clock p. m.

JOHN R. FERRIS.

Subscribed and sworn to before me this 7th day of February A. D. 1902.

MARTIN L. WELFLEY,
[NOTARY SEAL.] *Notary Public.*

133 DISTRICT OF COLUMBIA, *ss:*

Personally appeared John C. Kieny and being duly sworn, says, he was one of the jurors impaneled in the case of Keeley *et al. vs.* Moore *et al.* that began January 22nd and ended February 4th, 1902 in circuit court No. 1 before Chief Justice Bingham. That on the last day of the trial while the judge was giving the instructions, one of the jurors, a colored man by the name of Searcy was asleep and in an apparent stupor the entire time and had to be aroused when the jury retired. That after the foreman of the jury had been selected a man by the name of Thomas took from his pocket and read a paper containing one or more sheets, stating that was his opinion of the case from notes he had prepared from time to time since the beginning of the trial. That on reaching the jury-room the said Searcy was in an apparent intoxicated condition and proceeded to make an incoherent and rambling speech. That some of the men attempted to stop him but it was suggested that "he be left alone as he was drunk and would soon talk himself out."

JOHN C. KIENY.

Subscribed and sworn to before me this 7th day of February, 1902.

CLARENCE F. DONOHUE,
[NOTARY SEAL.] *Notary Public.*

134 DISTRICT OF COLUMBIA, *ss:*

Personally appeared George Pierce and being duly sworn says, he was one of the jurors impaneled in the case of Keeley *et al. vs.* Moore *et al.* that began January 22nd and ended February 4th 1902 in circuit court No. 1 before Chief Justice Bingham. That on the last day of the trial while the judge was giving his instructions, one of the jurors, a colored man by the name of Searcy, was asleep and in an apparent stupor the entire time and had to be aroused when the jury retired. That after the foreman of the jury had been selected, a man by the name of Thomas took from his pocket and read a paper containing one or more sheets. That on reaching the jury-room said Searcy was in an apparent- intoxicated condition and proceeded to make an incoherent and rambling speech. That some of the men attempted to stop him but it was suggested that "he be left alone as he was drunk and would soon talk himself out."

GEORGE PIERCE.

Subscribed and sworn to before me this 8th day of February, 1902.

S. A. TERRY,
Notary Public.

[NOTARY SEAL.]

135 DISTRICT OF COLUMBIA, *ss:*

Personally appeared S. W. E. Love and being duly sworn, says, he was one of the jurors that were impaneled in the trial of the case of Keeley *et al. vs.* Moore *at al.*, that lately took place in circuit court No. 1 before Chief Justice Bingham.

That on the last day of the trial and while the judge was delivering the instruction and charge, one of the jurors, a man by the name of Searcy, was in an apparent stupor, which affiant verily believes was from intoxication. That said juror remained in such stupor during the whole time said instructions were being given, notwithstanding affiant and others of the jurymen attempted to arouse him several times, but they did not succeed in doing so until the jury were retiring. That while said charge was being given by the court, a man somewhat stout in size and who apparently had no connection with the case and was sitting at the north table, several times motioned to affiant that he wanted the man aroused; that while in the corridor before going to the jury-room, one of the bailiffs handed affiant a typewritten paper and said it was for the jury; that affiant not knowing the purpose of the paper laid it on the table in the room and did not examine its contents; that when the jury reached the room said Searcy proceeded to make a rambling and incoherent speech; some of the men remonstrated with him, and tried to stop him, and it was suggested he be allowed to talk, that "he was drunk and would soon have his talk out;" that after said Searcy finished his "speech," he retired to one side of the room, set down and seemed to fall in a comatose or stupid condition and it must have appeared to all that the man

was under the influence of liquor and not in condition to
136 know the responsibility resting upon him.

That soon after a foreman was selected and before a vote was taken a man by the name of Thomas took from his pocket one or more sheets of paper containing writing matter and proceeded to read same to the jurors, saying that he prepared them from time to time since the beginning of the trial and that they were all correct from his standpoint.

Affiant further says that it seemed to be the universal opinion of the men that the man Thomson, who made the will that was involved, was not of sound mind when he did so; there was a motion for a vote upon the question of sanity and when the voting was near through some of the jurors urged that the vote be abandoned and a vote taken for or against the defendants. That while affiant finally acquiesced in the verdict, he firmly believed it was most unjust and contrary to the evidence and did so because it was absolutely necessary that he should reach his place of business as soon as possible; that when the jury reached the jury-room it was suggested by some of the jurymen that they should fins a verdict so as to be at their respective homes or places of business at 3 o'clock p. m.

S. W. E. LOVE.

Subscribed and sworn to before me this 7th day of February, 1902.

JOHN F. MEANY,
[NOTARY PUBLIC SEAL.] *Notary Public.*

137 DISTRICT OF COLUMBIA, *ss:*

Personally appeared J. F. Wallace and being duly sworn, says, he was one of the jurors impaneled in the case of Keeley *et al. vs.* Moore *et al.*, that began January 22nd and ended February 4th, 1902 in circuit court No. 1 before Chief Justice Bingham. That on the last day of the trial while the judge was giving the instruction to the jurors, a colored man by the name of Searcy was asleep and in an apparent stupor the entire time and had to be aroused when the jury retired.

That after the foreman of the jury had been selected, a man by the name of Thomas took from his pocket and read a paper containing one or more sheets, stating that was his opinion of the case from notes he had prepared. That on reaching the jury-room said Searcy was in an apparent- intoxicated condition and proceeded to make an incoherent and rambling speech and that some of the men attempted to stop him, and I was at the time of the verdict, and am still of the opinion that William Thomson the testator of the will involved, was not of sound mind when he made same.

(Signed) J. F. WALLACE.

Subscribed and sworn to before me this 8 day of February 1902.

L. S. FREY,
[SEAL.] *Notary Public.*

138 DISTRICT OF COLUMBIA, *ss:*

Personally appeared Hugh T. Taggart and being duly sworn says, that he was not present the whole time during the trial of the case referred to in the affidavit of Leo Simmons hereto attached, and paid but little attention to the individuals comprising the jury; that affiant simply assisted Mr. Simmons in some parts of the trial. That affiant noticed during the argument of counsel on both sides and during the charge of the chief justice, that one of the jurors at time- had his eyes closed when affiant looked toward him and that the impression made upon affiant by the circumstance, that the juror was suffering from headache; that affiant had no knowledge or suspicion until after the rendition of the verdict, that the juror's condition was of stupor due to intoxication.

— —.

Subscribed and sworn to before me this — day of February 1902.

— —.

139 ANDREW C. KEELEY ET AL.
vs.
JOSEPH H. MOORE ET AL.

Personally appeared Leo Simmons and being duly sworn says, he is the attorney for the plaintiffs in this case and conducted the trial that was begun January 22nd in circuit court No. 1 and ended February 4th, 1902, before Chief Justice Bingham. That the plaintiff, Andrew C. Keeley left the court on January 30th, 1902, for his home in Philadelphia and knew nothing of what transpired in the trial of the above cause thereafter. That the plaintiff Richard K. Paynter was not in said court at any time after January 29th, 1902. That neither of said plaintiffs could have had any knowledge whatever of the misconduct on the part of the jury who were supposed to hear said case.

That affiant had no knowledge whatever of any misconduct on the part of the jury or any one of them, until after the supposed verdict, when late in the afternoon of the day upon which it was rendered, he was advised that one of the jurymen was in an apparent stupor during the whole time the court was delivering its instruction and charge. Affiant was paying strict attention to what was said by the court and consequently did not pay any attention to the jurors; that the information, as to the condition of the juror, led affiant to believe that said juror did not give intelligent attention to the instruction or charge of the court and *and* in fact did not hear it; it
140 further suggested to affiant the condition of the juror was probably caused by intoxication which incapacitated him from properly performing his duties. That thereupon affiant, after consultation with his associate, Mr. Taggart, instituted inquiries in relation to the condition of said juror which led to the disclosure of the facts set forth in the affidavits, which have been filed in this cause.

— —.

Subscribed and sworn to before me this — day of February 1902.

——— ———.

And thereupon the defendants filed the following affidavits in opposition to said motion:

Thomas L. Jones, attorney-at-law, 616 D street northwest.

WASHINGTON, D. C., *Feb'y 6th*, 1902.

Mr. Searcy:

Please call at my office at 6 p. m. *to* this day. If you cannot come at that hour please come as soon thereafter as you can. I will expect you without failure. Business of importance to you.

Yours very respectfully,

(Signed) THOMAS L. JONES.

141 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me Robert P. Searcy, and being duly sworn, deposed and said that he was one of the jurors in the case of Keely, *et al. vs.* Moore, *et al.*, that took place in circuit court No. 1, before Chief Justice Bingham; and that he is the Searcy who made the affidavit that is filed in the motion for a new trial. *He says that he did not know the full contents of the affidavit until this day; that he signed an affidavit, but the same was not read to him, nor are the facts stated in that affidavit, which affiant believes to be in the handwriting of Thomas L. Jones*, the facts stated by him to Thomas L. Jones; that the affidavit as originally written, must have been changed by the said *Thomas L. Jones and Leo Simmons.*

He further says that that part of the affidavit which says that he did not hear the instructions oe charge of the judge, and knew nothing that transpired until aroused when the jury was about to retire, is utterly false and untrue; and that that part of the affidavit which says that he took a drink during recess, is utterly false and untrue; and that part of the affidavit which says that he was in no condition to take part in the voting of the jury, and does not know what transpired or what he did in the jury-room, is untrue and false.

He further says that all he told the said Leo Simmons and Thomas L. Jones was, that he had taken one drink in the morning and was a little drowsy on account thereof, and on account of being up the night before with sickness. That he refused to make any other statement to them, and did not make any other statement to them. That he made the affidavit mentioned in the motion for a new trial, under the following circumstances:

142 That on February 6th, 1902, a letter was sent to affiant's house and affiant was not at home, and then Thomas L. Jones came to 1702 Pennsylvania Ave., N. W., and presented the letter, the original of which is filed with this affidavit—and the said Thomas L. Jones and affiant started from affiant's place of business to the office of Thomas L. Jones. On the way down affiant was treated to two drinks and the car fare was paid by Thomas L. Jones.

That said Thomas L. Jones informed affiant at the time that he wanted him to come to his office on business, and that there was money in it for him. That when affiant and Jones arrived at Jones' office, he produced a bottle of whiskey and affiant took a drink. That immediately on arriving at the office, Jones told affiant that he wanted him to swear that he was drunk during the morning and after lunch of the last day of the trial; and that he took no part in the proceedings, and was unable to do so. Affiant told Jones that he could not do that as he would commit perjury. Jones answered and said that it would not be perjury. Affiant further said that he could not be used as a cat's paw; that the jury had arrived at what he thought a proper verdict, and that he could not be used to set it aside. That about 8.30 o'clock p. m. Leo Simmons, attorney for the plaintiff-, arrived. That when the said Simmons arrived, *he immediately commenced to persuade affiant to make an affidavit that he was drunk.* Affiant told him that he could not commit perjury; that this was the first time that he had served on the jury, and that he could not afford to do anything that was wrong and become notorious in that way. *That Simmons informed affiant that nobody would know anything about it;* that all he would have to do would be to make the affidavit, and that it would be read in court, and *that no outside parties would find out anything about it.* Affiant refused to make any affidavit
143 other than the one that he had taken the one drink. *Thereupon Leo Simmons stated that if affiant would make an affidavit stating that he, affiant, had taken one drink the morning before trial, and was drowsy, that they would pay him the sum of thirty dollars ($30),* and that he would *receive it* immediately; that when affiant demurred about making the affidavit, *attorney Leo Simmons informed affiant that three white men had made affidavits for fifteen dollars ($15) apiece saying that affiant was asleep and incompetent.* Affiant thereupon said that he would make an affidavit stating that he had had one drink, but would not say that he was incompetent, or that he had had two drinks, as Jones and Simmons desired him to say. *Thereupon it was agreed that affiant should receive thirty dollars ($30) for making the affidavit* as suggested. And thereupon an affidavit was written and read to affiant, which did not contain the allegations in the affidavit on file. That affiant made the affidavit as read which affidavit merely said that he was drowsy and had taken one drink; and Jones informed him that in case of a new trial if Mr. Simmons won the case, he would get twenty dollars ($20) more, and Simmons, while they were on the street looking for a notary public, *whispered to affiant that he would* receive one hundred dollars ($100) in case he, Simmons, ultimately won the case. *Said Simmons informed affiant that the plaintiffs had plenty of money, and were willing to pay it if they won the case.*

Affiant further says that after the affidavit was completed, and before it was sworn to, they left the place of Thomas L. Jones and tried to find a notary; and that Mr. Simmons went somewhere in the Columbian Law building, presumably to his office, and got

a check of thirty dollars ($30). That not being able to find
144 a notary in the neighborhood of the court-house, they went up on F street and found a notary on F street between Thirteenth and Fourteenth. That Mr. Simmons did not go into the notary's office, but affiant went in with Mr. Thomas L. Jones; that the affidavit was not read in the notary's office as affiant informed notary that he signed the same and knew the contents thereof; that while affiant and Jones were in the notary's office, Simmons went to the Riggs house to get the check for thirty dollars ($30) cashed; that he returned to meet affiant and Jones on F street and said that he was unable to get the check cashed, as Mr. Staples was not in. *Thereupon Mr. Jones said that the check was all right, and that he, Jones, would give affiant, next morning, his, Jones', check for thirty dollars ($30), and take up Simmons' check*, and thereupon Simmons gave the thirty-dollar check to affiant, but affiant desired to have the *thing* cashed instead of waiting until next morning for Mr. Jones. He and Mr. Jones thereupon went to the Ebbitt house and walked in. The night clerk was not there. That while in the Ebbitt house, they saw Mr. Leon Tobriner, and Jones said to be careful and *not let Mr. Tobriner see that* they had Mr. Simmons' check as Mr. Tobriner knew Mr. Simmons and they did not want Mr. Tobriner to know that Mr. Simmons was in it. Therefore affiant did not attempt to get the check cashed in the Ebbitt house, and affiant and Jones left and went to 1313 E street, Gray and Costley's place, and affiant tried to get the check cashed there, but was unable to do so. That *thereupon Jones said that affiant should keep the check, come to Jones' office in the morning and get a thirty-dollar check from Jones for the money. And thereupon affiant and Jones separated and affiant returned to his home.*

Affiant further says that when the jury retired in this case,
145 that the matter was talked over in the ordinary way, and that he stated that he was in favor of the defendants, and on the first vote, the jury stood ten to two in favor of defendants, and that affiant talked to those men and helped to bring them over. Several votes were taken and that on the fifth vote the jury stood twelve in favor of the defendants, and that they returned to the jury room and rendered their verdict, and then went to the marshal's office and received their pay. That affiant signed the pay-roll and received his pay.

Affiant further says that he did not know the contents of the affidavit filed by him until he read a notice in the Washington Times, and that immediately upon reading the same, he went to the office of Messrs. Lambert and Baker, and there stated to them what appears in this affidavit. The thirty-dollar check of Leo Simmons, which was payable to order of self, was taken by affiant to his home, shown to his wife, and the next morning cashed by Eugene Cedehoren, who has a place at Thirteenth and H streets, northwest. Affiant says that he now knows he did wrong by taking the money, but when it was offered to him, and paid to him, he only stated exactly the truth, and that he did not state the matters and things set out in the affidavit.

Affiant further says that the said Jones and said Simmons and he were together from 8.30 until some time *after ten o'clock p. m., the said Simmons leaving affiant* before the said Jones; and affiant and Jones going to the Ebbitt house and to the place on E street after the said Simmons had left them. Affiant says that thereupon he returned to his home, and on the following morning got the check cashed as heretofore described in this affidavit, and that he
146 heard nothing from the said Jones or Simmons from any time thereafter until 10.30 o'clock p. m. on the 12th day of February, affiant having been to the office of Lambert and Baker on that day in the afternoon thereof. That at 10.30 o'clock p. m. on said 12th day of February, the said Jones came to the house of said affiant, and demanded to see affiant on business. That affiant would not see him. That on the following day, February 13th, affiant went again to the office of Messrs. Lambert and Baker, and with them made a full statement of this case in the presence of certain parties, and that on the evening of said day, some time between eight and ten o'clock, an officer of the Metropolitan police force called at the house of affiant with a warrant to arrest him for petit lar*ency* in the taking of a check of the amount of thirty dollars ($30) belonging to Thomas L. Jones, and the officer read the said warrant and read the names of the witnesses, which he said were on the back of said warrant, the names of the witnesses being, "Leo Simmons, Thomas L. Jones, and Calvin Chase." That affiant was too ill to be taken away and the officer did not arrest him. That in the morning another officer came with the warrant and affiant was still in bed, and thereupon the officer had a doctor call, and affiant was not arrested. That later in the day affiant went, with attorney D. W. Baker, to the police court and found that the charge against him had been withdrawn and that the said Thomas L. Jones had written a letter asking that the warrant be withdrawn and the case against him nolleprossed, which, affiant is informed, was done.

Affiant further says that from the said sixth day of February, on the day that he received the said check, until half past ten
147 o'clock on the 12th day of February, A. D. 1902, he never saw the said Thomas L. Jones, and that the said Thomas L. Jones never at any time in the presence of affiant, claimed the said check of thirty dollars ($30) as belonging to him, and that he, the said Thomas L. Jones, never had the check in his possession.

(Signed) ROB'T P. SEARCY.

Subscribed and sworn to before me this 20 day of February, A. D. 1902.

(Signed) E. RICHARD SHIPP,
Notary Public, D. C.

DISTRICT OF COLUMBIA, *ss:*

Lodora Searcy being duly sworn, deposes and says that on Wednesday, February 5th, about 12 o'clock, a man called at the house to see Mr. Searcy. That he was a white man, over the medium

height, and had a full reddish mustache; he asked if Mr. Searcy lived at the house. The man inquired then what was the best time to see Mr. Searcy, and affiant said in the evening when he got through his work. That about 5.30 in the evening of February 6th, a note came for Mr. Searcy, *which note is the note that is filed with Mr. Searcy's affidavit.* That the bearer of the note was a girl and inquired where Mr. Searcy could be found. That affiant told the girl. That Mr. Searcy did not come home that evening until about 11.30 o'clock, and then he was under the influence of liquor. That since said day, while he has worked a part of a day, he has been sick and he got up out of his sick bed to come with affiant
148 to the offices of Messrs. Lambert and Baker. That as soon as affiant saw the article in the Washington Times in regard to the accusations against her husband, he and she agreed to go to the offices of Messrs. Lambert and Baker and there tell them how the whole matter occurred. Affiant further says that when her husband came home, the night of February 6th, he had with him a check of Leo Simmons, payable to the order of self, for thirty dollars ($30). That he did not then tell affiant how he secured the check.

(Signed) LODORA SEARCY.

Subscribed and sworn to before me this 12th day of February, A. D. 1902.

(Signed) RUTLEDGE WILLSON,
[SEAL.] *Notary Public.*

KEELY ET AL. vs. MOORE ET AL. } At Law. No. 43324.

D. W. Baker, being duly sworn, deposes and says that he is one of the attorneys for the defendants in the above-entitled cause, and that he was present all during the trial of said cause, and was in court during all the time that the jury was present. That on the last day of the trial he was in court and was present when the judge charged the jury, and that he noticed the jury. That Robert P. Searcy sat in the front row, second from the end,
149 and that he came into court with the other jurors at ten o'clock in the morning, and stayed until the judge finished his charge. That at no time, as far as affiant knows, was he asleep or dozing. He did, for a time, hold his hand over his eyes as though to prevent the light from the far window affecting them. That when at recess the court permitted the jury to go to lunch, Searcy walked out with the other jurors, and when the jury returned their verdict, he came with them. He was at no time, as far as affiant could see, under the influence of liquor. That after the trial and the jury was discharged, affiant talked with Searcy, both in the court-room and in the marshal's office where affiant went to summon some witness in another case, and that at that time the said Searcy was not under the influence of liquor.

Affiant further says that he was unaware that any objection was going to be made to the said juror, Searcy, until the affidavits were served on the attorneys for the defendants. That some days thereafter, the said Searcy, came to the office of Messrs. Lambert and Baker, and had in his hand a notice that appeared in the Times. He informed affiant and his partner, Wilton J. Lambert, that the notice contained falsehoods, and that he had never made any affidavit as contained in said notice, which said notice said that he had made an affidavit that he was drunk during the trial. He thereupon related to affiant all the circumstances of the making of the alleged affidavit, and he thereupon made an affidavit, which is filed in this cause.

——.

Subscribed and sworn to before me this — day of March, A. D. 1902.

——.

150 In the Supreme Court of the District of Columbia.

KEELEY ET AL. *vs.* MOORE ET AL. } At Law. No. 43324.

John A. Price, being duly sworn, deposes and says that he is a citizen of the United States and a resident of the District of Columbia and has a barber shop at No. 1702 Pennsylvania avenue, northwest; that Robert P. Searcy, one of the jurors in the above-entitled cause, worked for him during said trial, and is at present working for him. That on the day that said jury rendered its said decision, to wit, the 4th day of February, A. D. 1902, the said Robert P. Searcy was working for affiant. That he came to the shop in the morning and worked until some little while after nine o'clock, when he left the said shop to go to the court-house. That he returned to said shop about four o'clock. That in the morning when he left, he was perfectly sober, and transacted in the morning his ordinary business, as well as when he returned in the afternoon. I will further say that said Searcy was working for me for about two weeks prior to said date; that he came before and after sitting upon the jury, daily, and performed his duties, and that at no time while said jury duty continued, did he appear to me in any way under the influence of liquor.

(Signed) JOHN A. PRICE.

Subscribed and sworn to before me this fourth day of March, A. D. 1902.

(Signed) RUTLEDGE WILLSON,
Notary Public, D. C.

151 And the plaintiffs filed the following affidavits in rebuttal to the defendants' affidavits:

DISTRICT OF COLUMBIA, *ss:*

Personally appeared Thomas L. Jones and being duly sworn says, he is a member of the bar of the supreme court of the District of Columbia and has been for eight years past. That the facts and circumstances in relation to the sworn confession of Robert P. Searcy in relation to his condition while sitting as a juror in said court are as follows:

On the morning of the 6th of February, Mr. Leo Simmons met him and asked if he knew Searcy; affiant replied that he did and had known him for some time. Affiant has known Searcy for seven years and has had business dealings with him. Affiant was requested to see Searcy and another colored man by the name of Thomas, who were jurymen in a certain case in which Mr. Simmons was attorney and ascertain about the intoxication of Searcy and whether or not said Thomas had the notes it was claimed he had read to the jurymen, while considering their verdict, which he agreed to do. After considerable delay affiant finally found said Searcy late in the afternoon and informed him of what he wanted to know and what had been said about his being intoxicated. Said Searcy did not hesitate to admit same to be true and said he would call to see affiant that evening and tell him all about it. Affiant informed Mr. Simmons of what he had ascertained and stating that said Searcy would be at his (affiant's) office at 7 p. m. Affiant asked Mr. Simmons where he could be found at 8 p. m. saying he would advise him then what had been done. Mr. Simmons said he was going to the law library at the city hall at about 8 o'clock and affiant sug-
152 gested that he call past his (affiant's) office on his way there. Said Searcy came to affiant's office as he promised and then went into detail about his condition and why he was so; and the words used in relation thereto in said Searcy's statement are his (Searcy's) own words and version of the matter and he willingly offered to make statement, the only intimation he made in opposition to same was that it might effect his qualifications for "getting on a jury again." He then said it was the truth and he supposed it would be shown anyhow and if he gave his reason for being in the condition it would possibly make it better for him than not to have any explanation. Mr. Simmons came to my office about 8.15 p. m. and when he walked in, Searcy spoke to him and said "I was in bad shape the last day of the trial in your case as you have been told" and proceeded to tell Mr. Simmons why he was so and that he had had a flask of whiskey in his pocket when he went into court. Mr. Simmons then inquired of him if he expected any pay, stating that if he did, he, Simmons, would have nothing to do with him further about the matter and that he did not want him to make the statement unless it was voluntary on his part; to all of which said Searcy replied that he did not expect any pay and that what he said was the truth. Affiant then wrote out the statement for said Searcy in his own words and read it over to him, and Mr. Simmons directed me to hand it to him so that he could read it himself, which I did, and he then signed same. Mr. Simmons suggested that I

could have the oath administered and bring it to his office, affiant told him that he would charge thirty dollars for his services; Mr. Simmons demurred to the amount, but after I advised him that I had neglected my other work and had been most of the day in the matter, he said he supposed his client would have
153 to pay as he had had no understanding beforehand. Said Simmons told affiant he had only a dollar or two and that affiant would have to take a check; affiant told him he would prefer the cash as he would need the money next morning and Mr. Simmons said he would try to get his check cashed. After trying to find a notary near affiant's office, said Searcy and affiant finally went to the office of Aylett Holtzman and the paper was sworn to. Affiant was going to the Riggs house to give it to Mr. Simmons when he met him at the corner (the northwest) of Fourteenth and F streets, N. W. And Mr. Simmons told him he could not get the check cashed and would try no further and affiant took the check. Mr. Simmons then left affiant and Searcy at the northwest corner of Fourteenth and F streets, and took the car toward Ninth street; affiant and Searcy stopped at the corner a few moments and then went across to the Ebbitt house to try to get the check cashed, but could not, and while there he saw Mr. Leon Tobriner. Affiant and Searcy remained there in the lobby of the hotel some time, and said Searcy began to urge him to try further to get the check cashed, requesting affiant to give him a little something out of it. Affiant told him there and then that he would not give him one cent for what he had done. Said Searcy thereupon asked affiant to loan him three dollars and at his urgent request affiant consented to do so, provided he could get the check cashed and requested affiant to allow him, Searcy, to take the check and get it cashed and take out the three dollars and bring affiant the balance of the money either that night or by nine o'clock the next morning, which affiant consented to do, and thereupon he handed said Searcy the check, expecting that he would cash the check and bring him the money according to agreement, which to affiant's regret, he failed to do.
Affiant never saw anything of him again, though he tried
154 several times to do so and came to the conclusion next day that said Searcy had played a trick upon him. On the 13th of February following, affiant swore out a warrant for said Searcy's arrest on a charge of larceny, but upon reflection concluded that a case of larceny could not be made out because he intrusted said Searcy with the check. Affiant further says that the whole conduct of Mr. Simmons was open and above board, that said Searcy was perfectly sober both when he signed said paper and when he acknowledged it, that he was fully aware of its contents, which he said to the notary when he administered the oath. Mr. Simmons never went into a saloon with affiant, nor with said Searcy to his knowledge and said Searcy's whole tale in relation to said transaction, if it is as affiant has been informed, is a fabrication of outrageous lies and is without any foundation.

THOMAS L. JONES.

Subscribed and sworn to before me this 24th day of February, A. D. 1902.

PETER J. BACON,
Notary Public, D. C.

155 Personally appeared Thomas L. Jones and being duly sworn says, that he is the person referred to in a certain affidavit made by Robert P. Searcy on the 20th day of February, 1902, and filed in the case of Keeley *et al. vs.* Moore *et al.* That he was advised that the said Searcy had made an affidavit on the 12th day of February, 1902, which made certain slanderous charges against affiant, but what such affidavit contained affiant cannot state excepting from information, and has made another affidavit in relation thereto which he now reiterates. He has read a copy of the affidavit made by said Searcy on February 20th, 1902 and says that there is scarcely a word of truth in same. That the charge that he treated him (Searcy) to drinks is wholly untrue and that he did not have a flask of liquor of any kind in his office on February 6th or any other day, nor was one drop of liquor ever given him at any time in affiant's office, and the statements made by said Searcy in relation thereto is absolutely false. He did send the note attached to said affidavit to said Searcy, and stated that it was important to him, because he thought that when a juror was charged with being under the influence of liquor, while sitting upon the trial of a case, it was of vital importance to know that such charge had been made.

The statement that Mr. Simmons told said Searcy that he had paid three other jurors fifteen dollars ($15.) for their affidavits is absolutely untrue and without foundation, for the only thing that was said about the other jurors (and that was by affiant) was that several of them had told Mr. Simmons of Searcy's intoxication. Mr. Simmons did not mention the other jurors at all to said Searcy while in my presence, and the entire time Mr. Simmons was
156 present (which was about an hour altogether) said Searcy did not leave my presence. There was no promise of any kind held out to said Searcy nor any pay promised him of anything whatever, nor was any thought of doing so suggested and his whole tale is without foundation and in affiant's opinion, concocted to avoid the responsibility of failing to refund the proceeds of the check affiant left with him to get cashed.

Affiant further says that instead of being afraid of letting Mr. Leon Tobriner see Mr. Simmons' check which he had when he saw him, he waited some time in the lobby of the hotel intending to ask Mr. Tobriner to cash it for him, but he was talking with some gentlemen, and after waiting about ten minutes and their conversation continued, affiant concluded not to wait further.

And when he left the hotel said Searcy said to him that he was well known at the place of Gray and Costley on E street, and if he, affiant, would allow him to take the check in, they would cash it for him, and affiant accompanied him there and gave him the check as requested, but they refused to comply with said Searcy's request,

and when we came out said Searcy said he knew he could get it cashed at 13th and H streets, northwest, and he wanted affiant to go with him, but he refused to accompany him further. Searcy said he would get the check cashed if permitted, and bring him the money that night or early next morning under the conditions set forth in the former affidavits of affiant. Affiant has also read an affidavit of C. H. Armstead, a janitor at the Columbian Law building in relation to what took place there on February 6th and says that every word of same is true and correct.

———.

157 DISTRICT OF COLUMBIA, *ss:*

Personally appeared Aylett Holtzman and being duly sworn, says, that he is an attorney-at-law and a notary public and his place of business is located at No. 1321 F street, northwest, in this city. That shortly after nine o'clock p. m. of the evening of February 6th, 1902, Thomas L. Jones and another colored man by the name of Searcy came to his place of business and produced a paper-writing and said Searcy said he wanted to make oath to same; that said Searcy was asked if he had signed said paper and if he knew the contents or statements set forth therein, to which he answered, I do. Affiant then requested him to hold up his right hand and he did so, while affiant administered the usual oath to him, asking if he now made oath that the statements made in said paper were true, and he answered in the affirmative. Affiant then placed his name and seal to said paper and handed it to either Searcy or Jones, affiant does not now know which. That affiant saw nothing in said Searcy's manner to indicate that he did not know or fully understand what was stated in said paper, nor did he notice anything whatever in said Searcy's manner to indicate that he was not perfectly sober and in full control of all of his mental faculties, knowing perfectly well what he was doing.

AYLETT HOLTZMAN.

Subscribed and sworn to before me this 14th day of February, 1902.

PATRICK J. WALSHE,
Notary Public, D. C.

158 DISTRICT OF COLUMBIA, *ss:*

Personally appeared Aylett Holtzman and being duly sworn, says, he is the person who on February 6th, 1902, took the oath of one Robert P. Searcy, to a certain affidavit, filed in the case of Keeley *et al. vs.* Moore *et al.*, in the supreme court of the District of Columbia.

That he has on this day carefully examined said affidavit and can say positively that to his best judgment it is in the same condition it was when sworn to before him and there is no change whatever in same.

That he made a former affidavit in relation to said matter and now reiterates same.

That D. W. Baker and said Searcy came to his, affiant's, office several days after said paper had been sworn to, and said Baker was told by affiant in the presence of said Searcy, which is a fact, that he, said Searcy, at the time he swore to said paper, stated that he had read the paper himself before signing and that he fully knew the contents of same; said Searcy, in my judgment, was perfectly sober when he made said affidavit.

Affiant is very careful about such matters and always enters the dates of acknowledgments and oaths in a book kept for the purpose.

AYLETT HOLTZMAN.

Subscribed and sworn to before me this 7th day of March, 1902.

GEORGE C. AUKAM,
Notary Public, D. C.

159 DISTRICT OF COLUMBIA, *ss:*

Personally appeared Churchill Armstead and being duly sworn, says, he is employed at the Columbian Law building as janitor, in this city. That on the 6th day of February, 1902, between 8.30 and 9 o'clock p. m. while engaged in cleaning said building on the second floor thereof, he noticed two colored men enter said building and he came down and met them in the hall of the first floor. Whereupon he discovered that one of the men was Mr. Thomas L. Jones, a lawyer, with who- he, affiant, is well acquainted, and the other was a brown-skinned man with a heavy mustache. After talking with said men a short while, said Jones asked him if there was a notary public in the building and just then Mr. Leo Simmons came down from his rooms in said building and said Jones or the other colored man, affiant does not know which, said they could find no notary. Mr. Simmons then requested affiant to see if there was one in the building and affiant then went to the rooms of Mr. William M. Williams, then to the rooms of Mr. Clinton James, both of whom are notaries and found neither of them in; affiant then returned and reported that he was unable to find a notary. And to the best of affiant's recollection Mr. Simmons then said he did not know where one could be found, unless it was some one across from the Ebbitt house, near Fourteenth street. Said parties then left and affiant saw no more of them that night. Affiant talked with said Jones and the other colored man and can say positively that both of them were perfectly sober; that there was no indication of any kind whatever to show or lead one to believe otherwise.

C. H. ARMSTEAD.

Witness:
JOHN WAHL.

Subscribed and sworn to before me this 3rd day of March, 1902.

GEORGE C. AUKAM,
Notary Public.

160 DISTRICT OF COLUMBIA, *ss:*

Personally appeared James A. Johnson and being duly sworn, says, he knows Robert P. Searcy and is employed as bartender at the restaurant of Mr. Leo Oedenkoven, at 13th and H streets, N. W. in this city. Some time past between 8 and 11 o'clock p. m. said Searcy came to said place and asked affiant to cash a check for him for $30.00, at which time affiant saw nothing to indicate that Searcy was under the influence of liquor.

Affiant told him that he knew *he* could not cash the check without the consent of the proprietor, but would see the proprietor next morning and see if he would cash it. Said Searcy then purchased a drink and when paying for it affiant noticed that he had several bills, and asked him why he wanted the check cashed that night, and to the best of affiant's belief he replied, that he wanted it then or had promised to get it cashed. Said Searcy came again early next morning and the check was cashed and the money paid over to him.

JAMES A. JOHNSON.

Subscribed and sworn to before me this 11th day of March, 1902.
JOHN P. GARRETT,
Notary Public, D. C.

161 DISTRICT OF COLUMBIA, *ss:*

Personally appeared Leon Tobriner and being duly sworn, says, he is now residing at the Ebbitt house in this city and has been for some time past. That on the evening of February 6th, 1902, while talking to some gentlemen in the lobby of said hotel, about 9.20 p. m. or a few moments before, affiant noticed Thomas L. Jones and another colored man came into said hotel; and said Jones walked up to the clerk's desk, but for what purpose affiant does not know. Then said Jones and said colored man walked off to one of the columns in said lobby and remained apparently in conversation for about eight or ten minutes, and then left the hotel. That both of said men appeared to be perfectly sober, so far as affiant could judge, as he saw nothing to indicate otherwise. Affiant knows the time as above mentioned, for he looked at his watch just after they left and before going to his rooms and saw it was 9.30 p. m.

LEON TOBRINER.

Subscribed and sworn to before me this 7th day of March, 1902.
JOSEPH SALOMAN,
Notary Public, D. C.

162 DISTRICT OF COLUMBIA, *ss:*

Personally appeared Leo Simmons and being duly sworn, says, that he has read a copy of a certain affidavit made by Robert P. Searcy, purporting to contradict a certain sworn confession, made by him on the 6th day of February, 1902 and filed with other affidavits in

support of a motion for a new trial in the case of Keeley *et al. vs.* Moore *et al.* Affiant says that the statements contained in said affidavit lately filed are without foundation in fact. Affiant says, so far — he has any personal knowledge, the following are the facts and circumstances in relation to the sworn confession made by said Searcy. Affiant having been previously advised by several of the jurors that said Searcy was under the influence of liquor while considering the verdict in said cause, on February 6th, 1902, he met Thomas L. Jones, a member of the bar of this court, and asked him if he knew said Searcy, and he replied that he did and had known him for several years. Affiant stated to said Jones that he had been informed about said Searcy's intoxication and believing said reports to be true and well founded, asked said Jones if he could see said Searcy and see what he had to say about such charges; stating to said Jones, at the same time that he had been advised that one John T. Thomas, another one of said jurors, had made notes of the argument and evidence and had read same to the jury; affiant requested said Jones to make inquiry about that also. Between 4 and 5 o'clock p. m. of the same day affiant again saw said Jones and was advised that he had seen said Searcy, and he, Searcy, had admitted that he was under the influence of liquor as charged; that said Searcy had promised to call at his (Jones') office at 7 p. m. and he though- that said Searcy would voluntarily make a written statement to such effect. Said Jones stated to
163 affiant that if said Searcy did so, he would advise affiant of the matter, if he knew where to find him about 8 p. m. Affiant said to Jones that he would go to the law library at the courthouse about that time and Jones suggested to him to stop at his place on the way there, saying that he might not be able to see affiant next day. Affiant called at said Jones' office a short time after 8 p. m. and when he reached there he found said Searcy and Jones conversing together, but affiant had no intention of meeting said Searcy and did not expect to see him. Said Searcy spoke to him and said that it was true that he was under the influence of liquor as charged, or words to that effect. Affiant then asked him where he obtained the whiskey and he replied that he had it in a flask and took it with him on leaving home; that on account of sickness he had been kept up most of the night, as set forth in said confession. To test his knowledge of the matter, affiant then asked if he knew what the suit was about and he replied that it was to recover $91,000.00. Affiant then said to him that if he had or was going to make a written statement, he must understand that he would not pay him anything whatever for such, that affiant asked nothing of him but to know whether or not he admitted his intoxication. Said Jones then prepared the statement of the facts as related by said Searcy, read them to him, and to the best of affiant's recollection and belief said Searcy, at affiant's suggestion, took the paper and read it himself. He then signed same in the presence of affiant and Jones, and the paper on file is the identical one signed by said Searcy and every word that it contains now was upon

it when it was read to said Searcy and signed in his (affiant's) presence. Jones then stated that he could have the oath administered to the confession if affiant would wait; affiant suggested it
164 would be best to bring it to him the next morning, to which Jones then replied that he might not be able to see affiant next morning; that his services were worth thirty dollars, saying he had been engaged all day in trying to see said parties, stating that he had not been able to see the man Thomas, but would try to locate him later on. Affiant at first thought the charge rather high, but as Jones claimed he had abandoned all other business to attend to the matter, he concluded to pay same, as he had no previous understanding with him. Affiant told said Jones that he did not have more than a dollar or two with him but would give him a check. Jones requested affiant to try and get his check cashed, which affiant promised to do. Affiant came to his office, made his check to his own order and was on his way to get it cashed, when he met said Jones and Searcy in the hall of the Columbian Law building, where they were talking with one of the janitors, and was informed by Jones that he could not find the notary he expected to and asked if there was one in the building. Affiant asked the janitor to see if he could find a notary, and when none could be found, affiant stated to Jones there was one on F street, a Mr. Holtzman, up near Fourteenth street, who could be found usually until 9 p. m. Affiant was going to the Riggs house to get his check cashed and got on the car (the front one, of the F Street line) and to the best of his recollection and belief said Jones was smoking and they got on the trailor.

Affiant got off at Fourteenth and F streets and Jones and Searcy did likewise and went east toward Holtzman's office. The proprietor of the Riggs house was entertaining at a banquet and would not disturb him, and was returning on F toward Fourteenth street when he met said Searcy and Jones at the northwest corner of said Fourteenth and F streets, when said confession was handed to him.
165 Affiant said to Jones that he would have to take the check or come to his office to get his pay as he would not try further to get the check cashed; Jones replied that he would take the check, as he could get it cashed himself early next morning. Affiant then handed the check to said Jones, took the car and returned to the library, reaching there about 9.25 p. m., where he met Mr. Hugh T. Taggart and remained with him until about 11 p. m., when he went home.

That he never paid or offered to pay said Searcy one penny. That his statement that affiant had given him the check and that he had paid other jurors is without any foundation whatever. Affiant had very little to say to him excepting to inquire of his intoxicated condition while serving upon the jury.

Affiant never had any conversation whatever with said Searcy at any time excepting that which took place in the presence of Jones at the time mentioned. Affiant did not quite understand why said Searcy was willing to sign such a paper, but as he seemed to want

to explain matters and was admitting nothing but the truth as affiant firmly believed, and said he was a friend of Jones, he did not doubt his honesty. That he was advised by Mr. Wilton J. Lambert on February 13th that said Searcy had made an affidavit the day before in which he stated that affiant had been with him, Searcy, from 8 to 11.30 p. m.; had taken him to various saloons and gotten him intoxicated on said night of February 6th and that while in the intoxicated condition he had persuaded and induced him to make the affidavit. Affiant asked for a copy of said paper and Mr. Lambert promised to furnish same, but said D. W. Baker upon demand being made for a copy refused to furnish such or allow affiant to see the original. Affiant is not in the habit of drinking intoxicating liquors and was never intoxicated in his life. That never in his life did he enter a saloon with said Jones or Searcy or ever take a drink of any kind with either of them or in the presence of either of them, nor did either of them ever in his presence take a drink of liquor of any kind and no such thought ever entered his mind.

166 That while affiant was with said Searcy there was no indication whatever in his manner or condition that would show that he was not perfectly sober and there was not the slightest suspicion so far as affiant could see, that said Searcy had touched a drop of intoxicating liquor when he signed said paper.

Affiant further says he never paid nor promised to pay any one for making the affidavits in relation to the matter involved.

That on the 7th day of February past, he had been out to Good Hope D. C. to get an affidavit from Mr. Pierce one of the jurors and on his way home stopped to see Mr. Kieny about 6 p. m. Said Kieny *said* said affidavit and stated that he would go with me to the office of Clarence Donohue, a friend of his, to swear to same, and we went to the office of Clarence Donohue, who is associated with his father, John F. Donohue, in the real-estate business on East Capitol street near 3rd N. E. and the office was closed; we then went to the residence of said John F. Don-hue, which is about ½ mile from the office and said Clarence came out and accompanied us back to his office and said affidavit was sworn to and twenty-five cents paid as a fee, that being the amount charged by said Clarence.

Affiant has known said Clarence Donohue since he was a small boy and John F. Donohue his father is an intimate friend, with whoaffiant has had business relations for years. Affiant noticed that said Clarence, the notary public, and said Kieny were apparently intimate and having put them to considerable inconvenience and trouble and wishing to favor the young man he had known so long, after said affidavit had been sworn to and after affiant had bid them good-by and was at the door about to leave, he returned and handed said Clarence two one-dollar bills by placing same on the counter in the office and suggested that they should get theatre tickets with the amount and go to the theatre.

167 Whereupon the defendants, by permission of the court, called the jurors who sat in said case, and other witnesses in their behalf, and they testified as follows:

Thereupon GEORGE PIERCE was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Pierce, I believe you were one of the jurors in the case of Keeley *vs.* Moore. A. I was.

Q. And you made an affidavit for Mr. Simmons. A. I did.

Q. I read this part of the affidavit. "That on reaching the jury-room said Searcy was in an apparent intoxicated condition, and proceeded to make an incoherent and rambling speech. That some of them attempted to stop him, but it was suggested that he be left alone, as he was drunk and would soon talk himself out." Did you swear to that. A. I don't think so.

Q. Noe state the circumstances under which the affidavit was presented to you, and all about it. A. Well, Mr. Simmons came to my place and asked me to make an affidavit. He showed me one similar to that which had been made by some others of the jury, and asked me could I swear to that, and I said "No;" that if he would strike out three articles, after reading it over, then if I could be of any benefit to him, then I would make an affidavit, taking off three of the articles, and that was one of them.

Q. You wanted that struck out. A. I wanted that struck out.

Q. Now, I will read you this part of the affidavit. "That on the last day of the trial, while the judge was giving his instructions, one of the jurors, a colored man by the name of Searcy, was asleep and in an apparent stupor the entire time, and had to be aroused when the jury retired." A. That was one I wanted struck out.

168 Q. Now, you remember the facts surrounding the trial in this case. A. Yes.

Q. Was Searcy at any time asleep. A. Well, if you will let me make the statement I made to Mr. Simmons—probably we will get tangled up. I told him I remembered a man by the name of Searcy with his eyes closed, but I could not say that he was asleep.

Q. Now, at the room, was he drunk. A. I didn't notice anything peculiar about him.

Q. Did you hear anybody say that he should be just left alone; that he was drunk and would soon have his talk out? A. No, I did not.

Q. Did you say that? A. I made no remarks at all.

Q. Did you see Mr. Thomas take a paper from his pocket. A. No, I didn't see him take any papers from his pocket.

Q. What did you see him have in his hand? A. Well, Mr. Thomas made a speech, as other jurymen did; that is, several of them had some talk. Mr. Thomas talked and since I refreshed my memory recollects, I think he did have a little piece of paper in his hand. There was one thing about that I denied, and that was his having a piece of paper and saying that this was what he had gathered from time to time. To my knowledge he didn't say that. But he had a piece of paper, and he went on with some talk, the same as the others did.

Q. Did Mr. Searcy make any statement in the jury-room about the case? A. I really can't say that; I don't remember any particular——

By the COURT:

Q. You say that the gentleman who had the paper with writing on it read from it? A. He had a piece of paper in his hand. I won't say whether he read from it or not. But I did not
169 hear him make any *sich* statement as this was what he had gathered from time to time; that was the point.

Q. Did he say anything about it. A. Nothing about the paper to my knowledge.

Cross-examination.

By Judge COLE:

Q. Mr. Pierce, have you seen this paper since you signed it? (Handing witness paper.) A. (After examining same.) Well, now, I really could not say much about what——

Q. Well, wait a moment. I am not asking you that. Will you look at it. Look at the signature down there. A. Yes.

Q. Is that your signature? A. Yes sir.

Q. Do you remember of signing it? A. Oh, yes.

Q. Where were you? A. I was in one of my flower-houses at the time.

Q. And didn't you read it before you signed it? A. No sir, never read it.

Q. Well, didn't somebody read it to you? A. Mr. Simmons read it.

Q. Who else was present. A. Nobody but me and him.

Q. Well, where were you when you made oath *it* it? A. Well, I was outside at the time when the notary public came to my house. It was on a very cold morning, and next door to me I have two houses, and I have no one in the next house, and I heard some one knock on the door where there was no one living, and I stepped forward, and he stepped forward to the porch, and he said "Is this Mr. George Pierce?" and I said "Yes," and he said he was sent there with the paper, and I said "Yes." He said "This is to the best of your knowledge, where you have your signature here," and I said "Yes," and he went off. I never taken the paper in my hand to look at it at all.

170 Q. You say you signed and swore to that paper without knowing what was in it. A. I signed my hand before Mr. Simmons. Otherwise I never put my hand to the paper after that.

Q. Did I understand you to say that you did that without knowing what was in it? A. No more than Mr. Simmons read it to me. I felt sure he had made a little mistake. We were talking about these little things. I just told him what I wanted struck and he read it over that way, and I notice some things here have been scratched. There was three things I asked that they be scratched,

and he read it over to me with them scratched, and that was all right.

Q. And you signed it without looking at it? A. Yes sir; I never read it at all.

Q. And then when the notary public came you made oath to it, without looking at it to see what was in it? A. Yes. I never had it in my hand at all.

Q. Well, are you in the habit of doing things in that way? A. Well, I have often got in trouble doing things that way, but still it is my habit.

Q. You frequently sign papers without reading them, and didn't know what was in them? A. Yes sir.

Q. You have done so several times? A. Yes sir.

Q. Mr. Pierce I wish you would look at this paper again. You see down there, near the bottom of it, two words interlines in ink, don't you (handing witness paper)? A. (After examining same.) Yes sir.

Q. Didn't Mr. Simmons do that at your request, and there is one word scratched out there a little ways after it, isn't it? A. Yes sir.

Q. There is one scratched out and two interlined. Now, didn't Mr. Simmons do that at your request, and in your presence,
171 and didn't you send and get ink—pen and ink to do it? A. Oh, I sent and got pen and ink, yes sir.

Q. You sent and got pen and ink and then Mr. Simmons, in your presence, and at your suggestion, scratched out one word and inserted two, didn't he? A. I can't really remember that. It is likely that it is so; but I can't remember that I did or did not.

Q. Well, that is the change that you suggested in the paper at that time, isn't it? A. Yes, there were some changes. We went over it—went over the paper.

Q. Well, I say, that was one change that you suggested in that paper at that time? A. It is likely it was.

Q. Well, then, there you find the pen run through several words, a line and a part, don't you? A. Yes.

Q. That was done in your presence, wasn't it? A. It was done in my presence, yes sir.

Q. And that was done at your suggestion, wasn't it? A. Well, I never noticed the paper——

Q. Well, I ask you now? A. Yes.

Q. I ask you if that was not done at your suggestion? A. I suppose so.

Q. Well, can't you make it clear whether it was or not? A. I suggested that these certain things——

Q. Mr. Pierce please answer my question? A. I will, as near as I can.

Q. The question is, whether Mr. Simmons didn't draw the pen through those words there, a line and a part, in your presence and at your suggestion? A. He done that in my presence.

Q. And he also scratched almost the last word in the affidavit,

and inserted the two words there at your suggestion, didn't
172 he. A. I suppose so. The reason why that I can't say—just allow me—because I never looked at the paper, and Mr. Simmons, I knowed, he would do what was right; and he had the paper and I never looked on it at all. I went and got him the ink, and as we talked it over he scratched the different things, and I never looked on the paper.

Q. And after that was done you signed the paper? A. Yes.

Q. In his presence, after these changes were made. A. Yes sir.

Q. Now, do you undertake to say that you suggested any changes in that paper that he did not make? A. Well, I thought they were in the paper. This is what I had in my mind, and this is what I suggested——

Q. Can you answer my question. Do you mean to be understood as saying here now that you suggested changes in that paper to Mr. Simmons there that he didn't make? A. It seems that way.

Q. Well, I don't want what seems. I would like to know your recollection about it. Do you undertake to say that you made suggestions as to changes in that paper which Mr. Simmons didn't make? A. I would not like to say that it was done intentionally, and still it seems to me like I suggested these things, and other things to-.

Q. Well, you saw him make the alterations he did make? A. I saw him by the paper, but I did not look on it.

Q. How near were you to Mr. Simmons when it was made? A. I was standing right by the side of him.

Q. Right by the *sight* of him? A. Yes sir. Not a very bright scholar at all.

Q. You read without any difficulty, don't you? A. Yes.

Q. And write without any difficulty? A. Yes.

Q. You saw him make the alterations that were made? A. Yes.

Q. And then, after they were made, you signed the paper? A. I did.

173 Q. You told Mr. Simmons that you detected whiskey on the breath of this man, didn't you? A. Yes. He asked me about Mr. Searcy being drunk, and I said "No;" I would not say that he was drunk; as far as I could go, that I smelled liquors on him at some time. That is as far as I went.

Q. Well, where did you say you smelled liquors on him? A. Well, I don't think it was in the jury-room. At one time it was out here at recess hour. I don't think I said the jury-room, unless I am mistaken.

Q. The day you retired to consider the verdict? A. Yes.

Redirect examination.

By Mr. BAKER:

Q. In other words, Mr. Pierce, you told him to leave out that part about Searcy being asleep, and about him being intoxicated, and about him making an incoherent speech? A. That was, to the best of my knowledge, what I asked him to leave out, the three things.

By Judge COLE:

Q. And yet you signed it with it in? A. Yes.

By Mr. BAKER:

Q. You didn't know it was in there when you signed, did you? A. Well, I thought it was all straightened, because I had suggested it.

(The witness was here excused).

Thereupon SAMUEL W. E. LOVE *who* was sworn and examined.

Direct examination.

By Mr. BAKER:

174 Q. Mr. Love, in your affidavit, you say that while you were in the jury-room, it was suggested, in regard to Mr. Searcy, that he was drunk and would soon have his talk out. Did you say that? A. You say did I make the suggestion?

Q. No; I asked you did you say that? A. Yes; some one made that suggestion.

Q. No; I mean did you make the suggestion in the jury-room? A. No; I didn't make the suggestion.

Q. Who made the suggestion? A. I don't know. There was two or three around at the time, and I don't know who made the suggestion. That was when he was making his little talk.

Cross-examination.

By Judge COLE:

Q. Did you sign this paper—is that your signature there (handing witness paper)? A. (After examining same.) Yes, sir.

Q. Perhaps you had better read the affidavit. It won't take but a moment. A. (The witness did so.)

Q. That is the affidavit you made, isn't it? A. Yes, sir.

Q. Correct and true, I suppose? A. Yes sir, it is about all in there.

Q. Mr. Love, do you remember during the trial of the case hearing some one of the jurors make a declaration in relation to the case to the effect that the plaintiff had no case?

Mr. BAKER: I object to that, if the court please.

(After argument by Mr. Baker in support of his objection and by Judge Cole in advocacy of the line of questioning, the court permitted it to be answered.)

By Judge COLE:

Q. Now, Mr. Love, I would like to know whether you heard one of the jurors—one of your fellow-jurors while the case was
175 going on, and before you had heard all the evidence, and therefore before you had heard the charge of the court, make

the declaration that the plaintiffs had no case or words to that effect? A. We-, I don't know. I didn't hear the declaration in those words, that the plaintiffs had no case. I remember at the early beginning of the trial, when young Weir was first called that one of the jurymen stated, in his opinion, that this was merely a maker, as he used the term, "Witness maker," and I asked him what he meant, and he said a "Make-up witness." That was his impression. I heard that much. Then later on in the trial, when they were showing the signatures, I had some little conversation with this man Searcy. He sat next to me. It was relative to the genuineness of the signature, and while that was going on, he made some remark to that effect not in so many words but——

Q. What effect? A. It would have been to that effect, yes.

Q. To the effect that the plaintiffs had no case? A. Well, practically so, based on these signatures.

Q. I would like to know, Mr. Love, whether, since you made this affidavit which I have just shown you, you have been approached by anybody and requested to make a counter-affidavit, denying the same statements in there? A. Well, a gentleman called on me one evening and asked me if I didn't wish to—if I was not going to revise the affidavit, and asked me some question to that effect some words to that effect.

Q. Will you be kind enough to state whether he had any paper with him? A. Yes, he had my affidavit or a copy of it.

Q. Did he have any other paper? A. I believe he had several others.

Q. Did he have one which he wanted you to read it over
176 and sign? A. No.

Q. He didn't say anything like that? A. No.

Q. Now, who was that man? A. Well, I don't just know the gentleman's name.

Mr. BAKER: Mr. Van Casteel.

The WITNESS: Yes, I forgot his name. He was one of the stenographers that was there.

By Judge COLE:

Q. Now, was Mr. Van Casteel the only man that approached you on that subject? A. Well, yes, I guess I can say that he was the only man that approached me on the subject.

Q. Did a gentleman come to your house and wait on you in relation to it—was that Mr. Van Casteel? A. Yes, he was the one that came. He was there when I got there.

Q. And he wanted to know whether you did desire to revise that affidavit? A. That is what he said.

Q. Did he make any suggestions to you upon the points about which he thought it should be revised? A. Yes, some few points.

Q. Do you remember what they were? A. Well, one of them was relative to my statement there that I wanted to get out—that the reason of my voting with the others was that I wanted to get out and attend to my business, and he told me that was a very serious

matter for me to make such a statement, that that was my reason. He said that I had made a very grave mistake in making such a statement, and from his standpoint it apparently had that aspect.

Q. Well, was there any other point in the affidavit which he suggested might need revising? A. I can't remember right now.

177 Redirect examination.

By Mr. BAKER:

Q. You told Mr. Van Casteel, didn't you, that that statement that you wanted to get home by three o'clock was not true, didn't you? A. No, not in as many words. I said that I wanted to get through—is that in my affidavit—but I wanted to get home by three o'clock. Did I use that expression?

Q. Yes, I think you did?

Judge COLE: I will read what it says:

The WITNESS: Read that please?

Judge COLE (reading): "That while affiant finally acquiesced in the verdict, he firmly believed it was most unjust and contrary to the evidence, and did so because it was absolutely necessary that he should reach his place of business as soon as possible; that when the jury reached the jury-room it was suggested by some of the jurymen that they should find a verdict so as to be at their respective homes or places of business at three o'clock, p. m."

The WITNESS: That was the idea Mr. Baker.

By Mr. BAKER:

Q. You made a declaration about this case, didn't you, after it was over? A. What was that?

Q. Didn't you make a declaration to me in the marshal's office. A. Yes; I made a remark to you.

Q. Didn't you say to me that you were the man that held the jury out until three o'clock? A. No; I didn't say that I was the man.

Q. You said you were one of them? A. I don't remember making that remark to you.

Q. And didn't you say the only reason you did so was only not on account of the case, but because you were afraid Mr.
178 Simmons might have a miscarriage? A. No, not in those words. Now let me finish. There was two or three reasons for making the statement. I said "Now, I suppose that poor Simmons will have a miscarriage," and you said "No, Taggart would be more likely, for he was built that way."

(The witness was here excused.)

Mr. BAKER: Call Mr. Searcy.

Judge COLE: We object to the examination of Mr. Searcy. We have not read his affidavit.

Mr. BAKER: The proposition is to examine them all.

Judge COLE: Mr. Searcy has filed an affidavit here. We think they should stand upon his affidavit. If we want to examine him we think we should be permitted to do so.

Mr. BAKER: Let Mr. Searcy stand aside then.

Thereupon JOHN R. FERRIS was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Farris, you made an affidavit in this case. A. I did.

Q. In your affidavit you state that some one said when Mr. Searcy was talking "Never mind, let him alone; *his* is drunk." A. I believe that was said. That is my impression.

Q. Did you say that. A. I did not.

Q. Do you know who said it? A. I do not.

Cross-examination.

By Judge COLE:

Q. Read that affidavit over, Mr. Farris, please? A. (The witness did so.)

Q. Mr. Ferris, is that your signature. A. Yes sir.

179 Q. You made oath to that? A. Yes sir.

Q. Is it correct or not, Mr. Ferris. A. It is a correct statement.

Q. That statement is correct, is it? A. It is correct, to the best of my knowledge.

Q. All true. A. To the best of my knowledge it is absolutely correct.

Q. That is what I supposed or you would not have made oath to it. A. Or I would not have made oath to it, no sir.

(The witness was here excused.)

Thereupon ULYSSES S. VAUGHN was sworn and examined.

Judge COLE: This is one of the witnesses that has not made an affidavit. I understand the court to hold that we may enquire even of those who did not make an affidavit of the facts that occurred in the jury-room, as to those facts.

The COURT: I think so. We are taking the whole list of those who have made affidavits.

Judge COLE: I have no doubt of the right of the court to do it. It is in the court's discretion.

Direct examination.

By Mr. BAKER:

Q. You were one of the jurors in the Keeley *vs.* Moore. A. I was.

Q. Sat here during the trial of the cause? A. Yes sir.

Q. Do you know Mr. Searcy? A. I know him when I see him, that is all.

Q. Will you state whether or not on the last day of that trial, he was under the influence of liquor? A. I could not.

180 Q. What did you say? A. No, I could not.

Q. Did you see him? A. I saw him, yes sir.

Q. Did he have any of the appearances of being under the influence of liquor? A. Nothing; only sat there with his eyes closed; that was all.

The COURT (to the witness): What did you say.

The WITNESS: I said he sat there with his eyes closed, that was all.

By Mr. BAKER:

Q. Did you see him in the jury-room? A. Yes, sir.

Q. Did you see anybody, when you went to the jury-room, or started there, hand a paper to anybody else? A. The bailiff, I believe, gave a paper to one of the jurors.

Q. That was Mr. Setler, there (To Mr. Sutler:) Will you please stand up.

(Mr. Sutler did so.)

A. Yes, that young man there (indicating)

Q. That was the de-laration, wasn't it? A. Yes.

Q. Now, will you state whether or not in the jury-room Mr. Searcy had any appearance of being under the influence of liquor? A. He did not.

Q. And will you state what he said, if anything, in the jury-room? A. Nothing unusual for one of the jurors.

Q. It has been testified here that some person said, when he talked that he was drunk, and to let him alone, and he would soon have his talk out. Was anything like that said? A. I didn't hear it.

181 Q. You didn't see it? A. No sir.

Q. Did anybody at all in the jury-room, as far as you know, say anything at all about Mr. Searcy being under the influence of liquor? A. They did not.

Q. Was there anything unusual that happened in the jury-room? A. No sir, I can't say that there was.

Cross-examination.

By Judge COLE:

Q. Well, you would not undertake to say that somebody didn't say that Searcy was drunk, would you—you didn't hear anybody say it, but you would not undertake to say that some one did not say it? A. No. I won't undertake to say that they did not say it. I didn't hear them say it.

Q. Somebody may have said it, but you don't remember hearing it? A. No sir, I don't remember hearing it.

Q. Now, what part did Mr. Searcy take in the discussion of the case? I don't care anything about what he said, but I would like to know the part he took in the discussion of the evidence and in reaching a verdict. A. Well, I can't say; I don't remember.

Q. Did he take any? A. Yes sir, he did.

Q. Well, did he talk coherently? A. Why, no sir.

Q. He didn't? A. No sir.

Q. You didn't understand what he was driving at, did you? A. Well, I don't know that I understood that, but I didn't see anything out of the way with him; anything unusual happen at all.

182 Q. You didn't see anything unusual, and you didn't understand what Searcy was trying to drive at, did you—his statement of the case was not clear, in other words, was it? A. Yes sir, as far as I noticed.

Q. Well, was he standing or sitting in the jury-room? A. He was standing part of the time. I believe while he was talking he was standing.

Q. How long did he talk? A. Well, I don't know. I never took particular notice how long he was standing up.

Q. And you think his treatment of the case was intelligent and ligical and bright? A. To the best of my knowledge, yes sir.

Q. You saw nothing wrong with him at all? A. I never saw anything wrong, no sir.

Q. Nothing to indicate that he was not entirely himself and capable of handling himself? A. No sir.

Q. You say you saw him sitting with his eyes closed? A. I did, sitting here.

Q. That was here in the court-room? A. Here in the court-room, yes sir.

Q. And what was going on while he had his eyes closed? A. Well, the lawyers were delivering their arguments.

Q. He had his eyes closed while the lawyers were making their addresses to the jury? A. Yes sir.

Q. And about how much of the time while the lawyers were addressing the jury, did he seem to have his eyes closed? A. Well, whenever I noticed it.

Q. Whenever you noticed him? A. Yes sir.

Q. During all of the addresses? A. Yes sir.

Q. I was not present at the trial, as you know Mr. Vaughn and therefore don't know, but were the addresses to the jury all
183 delivered in one day? A. No sir.

Q. They took two days or part of two days? A. Yes, sir, parts of two days.

Q. By counsel? A. Yes, sir.

Q. And whenever you noticed him, while counsel were talking to the jury, his eyes were closed? A. On the last day.

Q. Well, was that the day that the judge charged the jury? A. Yes, sir.

Q. So that, on the last day, while counsel were talking, and while

the judge was talking—delivering his charge to the jury—Mr. Searcy had his eyes closed? A. Yes, sir.

Q. Did you notice whether he did, during any other part of the trial, except on the last day, have his eyes closed? A. Well, I believe he did. I can't say positively though.

Q. You don't remember positively about that? A. No sir.

Q. But you do remember distinctly that his eyes were closed during all the time of the last day of the trial while you were sitting in the box here? A. Yes sir.

Q. Now, who of the counsel addressed the jury on that day? A. Well, I believe that both talked on that day.

Q. Well, there were three or four in the case. Can you give the names of the gentlemen who addressed the jury on the last day? A. Well, I think Mr. Simmons had a little talk with them, and Mr. Baker had.

Mr. BAKER: He is getting me mixed up a little. I talked all the time on the case, but didn't speak on the last day.

By Judge COLE:

Q. Br. Baker didn't make the closing address to the jury did he—Mr. Lambert made that? A. Mr. Baker made that. Mr. Lambert made the first one.

184 Q. Mr. Simmons made the last argument? A. Yes sir.

Q. Who preceeded Mr. Simmons? Who immediately preceeded Mr. Simmons in addressing the jury? A. Why, Mr. Lambert.

Q. Well, that is what I thought. And this juror had his eyes closed during all that time? A. Yes sir.

Q. And yet, you say, when he got upstairs he seemed bright and lively and understood the case? A. I didn't see anything unusual.

Q. Did you see him smoke upstairs? A. I don't remember whether I did or not; I can't say.

Q. You don't remember whether he smoked in the jury-room. A. No I do not.

By Mr. BAKER:

Q. You don't mean to say, Mr. Searcy had his eyes closed all the time? A. I think he did at the last day.

Q. How often did you look at him? A. Well, I can't say Mr. Baker.

By Judge COLE:

Q. But his eyes were closed whenever you did look at him? A. Whenever I noticed him, yes sir.

(The witness was here excused.)

Thereupon JOSEPH MILLER was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Miller, will you state your name? A. Joseph Miller.

Q. And you were on the jury in the case of Keeley *vs.* Moore. A. Yes sir.

185 Q. Do you remember Mr. Searcy on that jury. A. I remember a colored gentleman called Searcy, yes, I don't know him.

Q. Will you state whether you noticed him during the trial of the case. A. No I did not. Nothing any more than sitting there.

Q. Will you state whether at any time during the trial of the case, he appeared to be under the influence of liquor? A. I could not say that he was. I sat in the back row, and he sat in the front, and I never noticed him, except that he was there.

Q. And you saw him in the jury-room when he went up? A. Yes sir.

Q. Now, in the first place, a paper was handed to you, wasn't it? A. To me.

Q. To somebody? A. Yes.

Q. Do you know what that was? A. Well, I don't know what it was. I never looked. It was a paper about that size (indicating).

Q. Did Mr. Sutler, the bailiff, hand the paper? A. I don't know Mr. Baker?

Q. Did you notice Mr. Searcy in the jury-room? A. Yes.

Q. Was anything the matter with him there? A. I never paid any especial attention to anybody there. I went up there with the jury and I never paid any particular attention to any of them.

Judge COLE: If the court please, we don't claim that paper was improper, or anything in it. We understand it was the declaration in the case, which it is usual to give jurors when they retire.

By Mr. BAKER:

Q. Will you state what Mr. Searcy did in the jury-room? A. Well, I can't state any specif- things that he did.

Q. Did he make any incoherent speech that you know of? A. There was nothing in the jury-room that attracted my special

186 attention. We argued and talked just like we had on several occasions—with different jurors. There was nothing there to make a special impression on my mind.

Q. Now, I will ask you whether anybody said Mr. Searcy was drunk? A. I never heard it.

Q. Did you say so? A. No sir.

Q. You were there with all of the jurors, were you not? A. Yes sir.

Q. If it had been said you would have heard it? A. Well, it might have been said and I not heard it. We were talking two or three in a bunch. While I was talking maybe somebody else was

talking. I didn't pay special attention. While there was nothing important that happened I just went along with what came before us.

Cross-examination.

By Judge COLE:

Q. Do you remember of hearing Searcy say anything up there at all? A. I can't say Judge that I did.

Q. As I understand, you divided up into knots, and talked together, talking two or three together, or three or four together, where you may have happened to be? A. Yes sir. You might understand how easily that is, that somebody might have said something and I not have heard it.

Q. Exactly. Somebody might have said there that Searcy was drunk and you not have heard it. A. Yes. I could not say that it was not said. I could not say that.

Thereupon JOHN J. THOMAS was sworn and examined.

Direct examination.

By Mr. BAKER:

187 Q. Mr. Thomas, you were on this jury? A. Yes, sir.

Q. Did you take any notes during the trial? A. I taken no notes during the trial.

Q. What paper was that you had in the jury-room while you were upstairs? A. Well, I would like to make a statement.

Q. Well, make the statement. A. When the judge adjourned the court for lunch, to give us a half hour I believe to get our lunch, we went down to get our lunch and I was a little late for the jury, and I didn't get a chance to eat my lunch; I didn't have but a little lunch, but I taken my lunch out in the jury-room, and when the jury commenced to talk over the subject I was to myself and commenced to eat. Finally they came to the conclusion they would take a vote. "Well," I says, "whenever you are ready for a vote I am ready." And then, why, they taken a vote and I found that I was with the majority with the voting, and then I went back to my lunch. There was two gentlemen that stood out. I finished eating my lunch and wrote in a liitle book—a book similar to this (indicating) words like these "I believe that the will as exhibited to us in the court was the last will of William Thomson, and that it was made for the purpose of disposing of his property according as we have heard in the court," and that the third name for that will, which was Hensey, I think was made for convenience, and upon that I think Mr. Love, he questioned me some. Finally the matter dropped. Then I says, "Gentlemen, that is my sentiment, and I bank here. I am ready to go in camp." I went back and had an apple in my pocket and sat down.

Q. So you didn't take any notes at all at the trial? A. All the notes I taken just simply what I wrote in the jury-room.

188 Q. Now, did you see Mr. Searcy in the jury-room? A. Yes, sir.

Q. Was Mr. Searcy under the influence of liquor? A. No; no more than he always appeared to me.

Q. Did he say anything in the jury-room? A. Oh, yes sir.

Q. And did he talk properly? A. Oh, yes sir; just about as properly as I am talking. You know, I can't talk much no way.

Q. Well, did anybody say he was drunk? A. I never heard it.

Q. Did you say he was drunk? A. No sir.

Cross-examination.

By Judge COLE:

Q. Why didn't you have time to get your lunch before you went to the jury-room? A. Well, I am a person subject to indigestion, and have been for more than thirty years. I contracted it in the army, and I went from the court-room down here to Whitney's to get a glass of cider, and I got a glass of cider and went from there to the market and bought some ginger cakes and three or four apples. That is what I take for my lunch every day while in court; nothing more or less.

Q. So, instead of getting a lunch near here somewhere you went to get a glass of cider? A. I didn't drink anything else. I didn't take any whiskey, because it would just set me up, you know.

Q. Well, do you know you wrote the things you had on the paper or book after you went into the jury-room? A. Why, it was not more than two or three lines.

Q. The question I asked you was whether you said you wrote, whatever it was, on the book or paper after you went in the jury-room? A. Yes; wrote after I went into the jury-room. Excuse me, please—after the jury had taken the first vote I wrote. That
189 is all.

Q. But you had nothing there—no notes there that you had taken during the trial, or that you had written at home, or elsewhere, but everything you had there you wrote in the jury-room? A. Everything I had there I wrote in the jury-room.

By Mr. BAKER:

Q. Did you tell anybody when you took this paper out that it was notes you had taken at the trial? A. I did not.

By Judge COLE:

Q. Now Mr. Thomas, will you tell me once more what you wrote there and read to the jury. I didn't catch it. A. I wrote—I said, after the jury had taken the first vote, before I went back to my lunch—then I wrote in my book—just tore off a leaf out of the little book like this (indicating), and I said in that—making my suggestion to the rest of the jury, I believe, that the will, that is exhibited before us in the court was the will of William Thomson made for the purpose of disposing of his property to the persons named, and

that the third name to that will, which was had or attached by the United States consul, when he had intended to go to London t*l* get Mr. Phelps—he was the consul at London—to certify to that paper, I said that I believed for convenience he taken Mr. Hensey——

Mr. BAKER: Cooksey.

The WITNESS (continuing): That he taken Mr. Cooksey at the most convenient way of fixing the deed as he wanted it, London being far off, and it was kind of cold or something, as the consul has said here, and they didn't care to take the journey, and Mr. Love, he taken me up and said that would not pass in law, or something to that effect. "Well" I said, "that is my views. I bank here." I said "I am ready to go in camp" "Now," I said, "gentlemen you have it in your power to keep me here all night,
190 but I bank here, and I am going to camp right here."

Q. Well, you finally voted on the question of how you would find—who you would find for, and not upon the other question of whether the will was valid? A. All the questions had been discussed in the jury-room, as to the insanity. The jury discussed all the questions that were argued here in the court.

Q. But you didn't take any vote upon the question of whether the will was valid or not—you just voted upon the question of whether you would find for the plaintiff or defendant, didn't you? A. The majority of the jurors decided—after the jury organized and they commenced discussing all kinds of questions relative to the matter, why then some of the jurors, they said that they thought it would be better to buckle down to certain things at once, and they commenced to discuss the insanity of Mr. Thomson, and so on, and another question that I don't exactly call to mind now.

Q. Well, there was a good deal of difference of opinion amongst you on that question of insanity, wasn't there?

Mr. BAKER: Well, I object to going into that questions of insanity in the jury-room.

Judge COLE: Very well. I have some doubts about it. I won't press it.

(The witness was here excused.)

Thereupon JOHN J. SCHAFER was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Schafer, I believe you were a member of this jury? A. Yes sir.

Q. You were foreman of the jury. A. Yes sir.

Q. Did you see Mr. Searcy on the last day of the trial. A. I saw him, yes sir.

191 Q. Was he or was he not under the influence of liquor? A. I don't think he was.

Q. Did you see him in the jury-room? A. Yes sir.

Q. Talk with him? A. No sir.

Q. Did he talk any in the jury-room? A. Well, me and Mr. Miller was sitting off to one side—me and Mr. Miller and Mr.—he was out beyond that table and I didn't pay any particular attention to him; whatever he said I don't know.

Q. Did he vote when the jury voted? A. Yes sir.

Q. Did you notice anything about him by which he appeared to be intoxicated? A. No sir, I did not.

Q. Did you hear anybody say he was intoxicated? A. No sir.

Q. Was there anything unusual went on in the jury-room? A. No sir.

Cross-examination.

By Judge COLE:

Q. You don't know whether Mr. Searcy said anything or not? A. I do not.

Q. He was away from you in another part of the room with two other men? A. Yes sir.

Q. And you didn't really see enough of him up there to form a very good judgment of whether he was under the influence of intoxicating liquors or not? A. Indeed I did not sir.

Q. He may have been pretty well under the influence of liquor, and you not have noticed it? A. The only way I would not have noticed it would have been in his speech.

Q. And you didn't hear him talk? A. No sir.

Q. So you could not say whether he was under the influence of liquor or not? A. No sir.

192 Redirect examination.

By Mr. BAKER:

Q. Did you see him do anything unusual? A. No sir, I did not.

Q. Was he walking around all right while up there? A. Well, he was up behind the table, and I had my back to him.

Q. Who was with him? A. I could not tell you that.

(Here the witness was excused.)

Thereupon RICHARD L. CRAEMER was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Cremer, you were on this jury? A. Yes sir.

Q. Did you see Mr. Searcy on the last day of the trial? A. Oh, yes sir.

Q. Did he or did he not appear to be under the influence of liquor? A. I don't think so.

Q. Did you see him in the jury-room? A. Yes sir.

Q. Did you hear him talk up there? A. Yes sir, I heard him talk.

Q. Did he say anything out of the way? A. No sir; I should think not.

Q. Was he incoherent in his speech or anything like that? A. Not at all sir, not at all.

Q. Did he vote when the jury voted? A. Yes sir.

Q. Did you hear anybody say that he was drunk and would get it over soon; let him have his talk out or something like that? A. I did not sir.

Q. Did you say such a thing? A. No sir.

193 Cross-examination.

By Judge COLE:

Q. Well, you didn't see very much of Mr. Searcy after he went upstairs did you? A. Well, I was on the same side of the room he was. We were on this side of the jury-room, with a crowd on each side.

Q. How near were you to him? A. I may have been within three feet of him or I may not have been within ten feet of him, I didn't measure it.

Q. Do you mean to say, you don't remember how far you were from him? A. No sir, I may have been within 4 feet or six feet.

Q. You don't mean to say positively that he was not under the influence of liquor to some extent, do you? A. According to my judgment he was not. I didn't think of such a thing.

Q. Now what opportunities did you have to form that judgment—did you talk to him personally; did you and he discuss the case together at all? A. No sir. We were all talking together up there.

Q. Now, that is what I want to know. Did you talk with Mr. Searcy about the case? A. I don't think I did individually, but I heard him talk.

Q. You heard him talking? A. Yes sir.

Q. Were you close enough to him when he was talking to notice what he was saying to the man *men* he was talking to? A. Nothing more than to know it was concerning the trial of the case.

Q. You are quite sure you were near enough to him to know what he was talking about? A. Yes sir.

Q. You feel confident he was not under the influence of liquor at all? A. I am sir.

194 Q. Had you known before you met him on the jury? A. I did not sir.

Q. Did you notice his sleepy actions in the box here before you went up? A. I was sitting just behind him. I could not see it.

Q. You could not see it? A. No, sir.

By Mr. BAKER:

Q. Did Mr. Simmons call on you at any time to make an affidavit? A. No, sir.

(The witness was here excused.)

Thereupon WILLIAM N. HORSKAMP was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Horskamp, you made and affidavit in this case? A. Yes sir.
Q. You said in that affidavit that some one said when Mr. Searcy was talking, that "Never mind, he is drunk; let him have his talk out" or something like that. A. Yes sir.
Q. Did you say it? A. No sir.
Q. Do you know who said it? A. No, sir, I don't remember now.
Q. What did you say? A. I said I don't remember now.

Cross-examination.

By Judge COLE:

Q. Well, you didn't say in your affidavit that you did say it. A. No sir.
Q. You said in your affidavit that you heard somebody else say it. A. Yes sir.
Q. That is true I suppose. A. Yes sir, that is true.
195 Q. And it is true that he was drunk, isn't it? A. To the best of my knowledge, he was.
Q. That is what you said in your affidavit? A. Yes.

Redirect examination.

By Mr. BAKER:

Q. Now, what did he do to make you think he was drunk? A. Well, I have been that way many times myself.
Q. Well, he talked up there didn't he? A. Yes.
Q. He gave his opinion of the case, didn't he? A. Yes, I didn't pay much attention to him.
Q. Well, you didn't hear him, did you? A. Yes.
Q. Well, what did he say? A. I don't remember now; I didn't pay much attention to him.

(The witnesses was here excused.)

Thereupon J. F. WALLACE was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Wallace you were on this jury. A. Yes sir.
Q. I believe you filed an affidavit? A. Yes sir.
Q. In your affidavit you said that somebody said, when Mr. Searcy was talking, that "He is drunk; let him have his talk out." A. I don't remember of having made that statement in the affidavit.

I may have; but I don't remember of having stated that in the affidavit.

Q. Mr. Wallace, in your affidavit, you state "that after the foreman of the jury had been selected a man by the name of Thomas took from his pocket and read a paper containing one or
196 more sheets, stating that was his opinion of the case from notes he had prepared." Did Mr. Thomas say that? A. I remember Mr. Thomas having said "Gentlemen I have prepared notes."

Q. He prepared them up in the jury-room, didn't he? A. He didn't say where he had prepared them.

Q. Then you say "that on reaching the jury-room said Searcy was in an apparent intoxicated condition, and proceeded to make an incoherent and rambling speech, and that some of the men attempted to stop him." Is that so or not? A. That is so; I remember it. To the best of my knowledge, that is right.

Q. And what did he say, now? A. Well, I don't remember exactly what he said, but he was talking there; talking in a rambling way.

Q. He was talking on the case, wasn't he? A. Yes; making some remarks on the case; I don't remember the words; I didn't pay much attention to it.

Q. Did you hear anybody say that he was drunk? A. Up there.

Q. Yes, in the jury-room. A. No; I don't remember of hearing it.

Q. Did you say he was drunk to anybody up there in the jury-room? A. Not that I remember.

Q. Now, you say that on the last day of the trial he was apparently asleep. Where were you sitting on the jury-box? A. I was sitting just next to him on the right.

Q. Did you notice him particularly? A. Yes sir.

Q. You would not swear that he was asleep, would you? A. Yes sir.

Q. That he was asleep? A. Yes sir; a great many times I kicked him, so as to wake him up. What I mean by kicking him—I knocked him on the foot on several occasions, and on the side of the leg, to try to get him awake.

197 Q. You didn't bring that to the attention of anybody during the trial, did you. A. Not during the trial.

Q. You didn't tell anybody here in the room anything about it or anything of the kind? A. You mean at that time?

Q. Yes, at that time. A. No, not at that time; but I mentioned it on other occasions though.

Q. And you never said anything about it until the whole case was over, did you? A. Oh yes; I mentioned it to other jurors at times.

Q. When? A. Well after the case was over.

Cross-examination.

By Judge COLE:

Q. Well, you thought he was drunk when you were up in the room. A. I took it that, yes sir.

Q. And while you don't remember to have said so to anybody there, you may have said that? A. I may have said it.

Q. You may have said to some of your fellow-jurors up there that he was drunk? A. I don't remember it at all.

Q. But you may have said so? A. Yes, I may have.

Q. Now, you say you sat next to him here? A. Yes sir; all during the trial.

Q. You sat next to him during all the trial? A. Yes sir.

Q. Do you remember whether he seemed to be in a sleepy or dozing condition on any day prior to the—— A. Yes sir.

Q. He did. A. Yes sir. I knocked him on the foot several times with my foot.

198 Q. On the last day of the trial he was in the same condition? A. Yes sir; he was asleep.

Q. Could you say whether it was worse on the last day than it was on the former days or not? A. Well, I think he was, yes sir, more so. More sleepy on that occasion than on either of the others.

(The witness was here excused.)

Mr. BAKER: Now, Mr. Searcy, will you take the stand.

Judge COLE: Well, we don't see the necessity of examining Mr. Searcy. His affidavit is filed here.

Mr. BAKER: I offer him. Will you take the stand Mr. Searcy.

Judge COLE: We think that the parties should rely upon his affidavit.

Mr. BAKER: Well, we have the testimony of other witnesses whose affidavits are here. I shall offer the testimony before the court of Mr. Searcy. I want to ask a very few questions.

The COURT: I don't see why there should be any different method pursued with him than with the other jurors who have been called. Other jurors have been called whose affidavits are on file. They have been produced and been examined with reference to them, and further with reference to any facts that were not in their affidavits.

Thereupon ROBERT P. SEARCY was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Your name is Robert P. Searcy. A. Yes sir.

Q. And you were a juror in Keeley *vs.* Moore. A. Yes sir.

Q. You sat in the second seat there. A. Yes sir.

Q. Now on the last day of the trial Mr. Searcy were you

199 asleep or not? A. I were not.

Q. Did you hear the charge of the court? A. I did sir.

Q. When you went to the jury-room, were you under the influence of liquor or not? A. I were not sir.

Q. How many drinks of liquor did you have on that day? A. I taken one at half past six o'clock in the morning before going to the shop, and I was down in the shop during all the day.

Q. Then you went to the shop did you? A. I then went to the shop and went to work.

Q. What is your business? A. I am a barber by trade.

Q. Did you shave any people that morning? A. Yes sir.

Q. And after you got through shaving did you come down to court? A. I came to court and left there just in time to get here at 10 o'clock.

Q. And you remember Mr. Simmons's making the last speech to the jury or not? A. Yes sir, I remember Mr. Simmons' statement.

Q. And you remember the court charging the jury? A. Yes sir.

Q. And di- you hear what the court said? A. Yes, sir; I turned this way (indicating) to look him right in the face; to listen to every word he said.

Q. Do you remember having your eyes shut on that day part of the time? A. Yes sir.

Q. Why was that? A. My eyes is weak, being up the night before, and the light blickering in there on me, why I closed my eyes, and at the time I had my eyes closed mostly was during Mr. Lambert's speech.

Q. That was the day then? A. Yes sir.

Q. Now, while you were in the jury-room, did you make any statement to the jury about the case? You need not state the
200 substance of it? A. Yes sir.

Q. Whom did you talk with, do you remember? A. I talked—well I talked with the entire body—the panel, and then I went over and talked with Mr. Love, I think is his name, and I also talked with Mr.—a gentleman over there, Mr. Ferris—Mr. Love and Mr. Ferris. I went and set down by their side and talked with them quietly on the question.

Q. Did they talk with you? A. They did.

Q. Did anybody there say that you were under the influence of liquor? A. I didn't hear it, and I don't think it was said.

Q. You made an affidavit in this case, I believe, for Mr. Simmons.

Judge COLE: If the court please, I object to their going into any question about the affidavit.

(After further argument by Judge Cole:)

Mr. BAKER: I ask him now to state the circumstances under which the affidavit was made that was filed in this case, which affidavit says he was under the influence of liquor so that the court may know how it was obtained. It is on file, the record is against him, and he has got a right to explain it.

(After further argument by Mr. Baker and Judge Cole:)

The COURT: Let's see what is in the affidavits, and then ask your questions afterwards.

Judge COLE: Unless your honor requests *leaf* to do it I will declines to read even Mr. Searcy's affidavit, the one filed by Mr. Simmons. If they desire, we will be very glad to have them read that one.

The COURT: The counsel has called for the reading of it, yes.

201 (Mr. Baker here read aloud the affidavits of the witness Searcy and one John A. Price, and Judge Cole read the affidavits of Mr. Leo Simmons and Thomas L. Jones and Aylett T. Holtzman.)

202 MARCH 15TH, 1901—Saturday, at 10 o'clock a. m.

The court met pursuant to adjournment.

Present: Leo Simmons, Esq., and Judge Charles C. Cole, on behalf of the plaintiffs, and D. W. Baker and Wilton J. Lambert, Esqrs. for the defendants.

Whereupon ROBERT P. SEARCY resumed the stand and was further interrogated.

Direct examination.

By Mr. BAKER:

Q. Mr. Searcy, you heard the affidavits read here yesterday? A. Yes, sir.

Q. I will ask you whether or not during this trial you carried a flask of liquor with you? A. I did not, sir.

Q. Did you, on the last day of the trial have a flask of liquor with you? A. I did not, sir.

Q. Did you tell Mr. Simmons, or Mr. Jones, in Mr. Jones' office, that you had a flask of liquor with you on the last day of the trial?

Judge COLE: Now, if the court please, why go over these matters. He has covered this by his affidavit, and I don't see why——

Mr. BAKER: I only want to ask him a question or two, Judge Cole.

Judge COLE: Perhaps that is the shortest way, then.

By Mr. BAKER:

Q. Did you? A. Positively I did not, sir.

203 Q. How many times did you see Mr. Jones on the 6th day of February, the day that you were at Mr. Jones' office? A. Only once, sir, and he came up to 1702 Pennsylvania avenue for me, and requested me to go with him—get permission from my boss to leave——

Q. Well, you went with him? A. I went with him. I could not leave without my boss' permission. I was the only man that was working in the shop with a guarantee, and I could not go without the permission of my boss, and he gave me permission.

Q. Had you seen him any time that day before he came to the office? A. No; I saw him during of the trial.

Q. No, no. I mean on this particular day? A. No, sir; I did not. If you will allow me——

Q. Did Mr. Jones ever have that check in his possession? A. He did not. Mr. Simmons presented the check to me himself.

Q. Where? A. On the corner of 14th and Pennsylvania avenue.

Q. 14th and Pennsylvania avenue? A. Yes, sir.

Q. Or F street, was it? A. I mean Fourteenth and F street, right across from the Ebbitt house.

Q. The day that Mr. Jones called, was that the day on which you made the affidavit for Mr. Simmons? A. On the evening, yes, sir. He came to the shop about half past six o'clock, I think, between half past six and seven.

Q. And had you yourself up to that time received any word from Mr. Jones? A. I had not. He sent a letter to my house, but my wife——

Q. I am asking you what you received yourself? A. I did not.

Q. Did you see him before he came to the barber shop?

204 A. I did not, sir.

Cross-examination.

By Judge COLE:

Q. Mr. Searcy, you made two affidavits, did you not, in the office of Messrs. Lambert & Baker? You made one there soon after the affidavit you made for Mr. Jones was filed here in court, didn't you? A. I made one affidavit in Mr. Baker and Lambert's office.

Q. When did you first go to Lambert and Baker's office and make an affidavit? A. I think, sir, as well as I can remember, that it was on the 12th day of February (referring to memorandum book). I picked up a newspaper and cut a clipping from it——

Q. Never mind. I don't care how you happened to do it, but you went there on the 12th day of February and made an affidavit? A. Yes, sir, I think it was the 12th (referring to newspaper clipping).

Q. Well, now, the affidavit of yourself that is filed here, that you made in Lambert and Baker's office, is dated the 20th day of February. Now, in that first affidavit that you made in Lambert and Baker's office, didn't you say that Mr. Jones and Mr. Simmons went around to drinking saloons with you and got you drunk, and got you to make that affidavit while you were drunk? A. I did not, sir.

Q. Didn't you subsequently, in a conversation with Mr. Taggart, tell him that they did? A. I did not, sir. I had no conversation with Mr. Taggart.

Q. Well, with Mr. Gould? A. I made a statement before Mr. Gould in the presence of Mr. Taggart.

Q. Well, didn't you say to Mr. Gould in the presence of

205 Mr. Taggart that they took you around through the city, and were with you from early in the evening until eleven o'clock, and got you drunk, and got you to make an affidavit while you were drunk? A. I did not, sir.

Q. What? A. I did not.

Q. Didn't you say that you went into Bulkley's saloon with them? A. I said that Jones and I went into Bulkley's saloon.

Q. Didn't you say that you and Jones and Simmons went into Bulkley's saloon? A. I did not, sir.

Q. Well, didn't you say that Jones and Simmons got you drunk? A. I did not, sir.

Q. Didn't you say that you were drunk when you signed that affidavit? A. I did not, sir.

The COURT (to Judge Cole): You are asking if he didn't say that to Mr. Taggart and Mr. Gould.

Judge COLE: Yes. I ask him if he didn't say that to Gould and Taggart, and if he didn't put it in the affidavit that he made—the first affidavit he made—in Lambert and Baker's office.

By Judge COLE:

Q. That night, after you made the affidavit for Mr. Jones and Mr. Simmons, you went home, didn't you? A. I did.

Q. How soon after you made that affidavit—what time did you get home that night? A. After leaving Mr. Simmons, at Fourteenth and F streets, Mr. Jones and I, after Mr. Simmons——

Q. I don't care about that. I want to know what time you got home? A. As near as I can recollect, it was between half past ten and eleven.

Q. Well, were you drunk when you got home? A. Well, no I was not drunk. I was sensible of what I was doing, but I felt the effects of what whiskey I had drank.

206 Q. You didn't go to any place after you left Jones? A. No place, but straight home as I could go.

Q. You went to Thirteenth and H streets to get the check cashed, didn't you? A. No, sir. I went there the next morning.

Q. Well, didn't you go there that night to get it cashed? A. I did not.

Q. Don't you know he had an affidavit up here that you made—what was the name of that man? A. Well, I can't call his name, sir.

Mr. BAKER: Well, I object to referring to the affidavit here. The affidavit says he went there the next morning, Judge.

Judge COLE: Well, the affidavit says he went there that night, too.

Mr. BAKER: I think not.

By Judge COLE:

Q. Now, do you know James A. Johnson? A. I don't know that I do, sir. There are so many Johnsons.

Q. You know a man that tends bar for Oedenkoven, if that is the way to pronounce it, at Thirteenth and H streets? A. I don't know him by his name.

Q. You know a man who tends bar there, don't you? A. I don't

know him by name. I do by sight. I have seen two men there, but I don't know either of their names.

Q. Now, didn't you go in there the night of the 6th—didn't you go in there that night to ask to have that check cashed? A. I did not, sir, to my recollection. I am on my oath now and want to tell the truth as near as I can.

Q. Well, you would remember it if you had done it, wouldn't you? A. I should think I ought to.

207 Q. Now, didn't you go in there that night to ask to have it cashed, and didn't he tell you that he could not cash it without the permission of the proprietor, and he was not there? What do you say to that—isn't that so? A. No, sir; not to my recollection.

Q. Then didn't you have something to drink after that, and when you went to pay for it took some bills out, and when you took the bills out didn't he ask you why you wanted to get the check cashed? A. No, sir; I did not.

Q. And you said that you wanted to take the money some place? A. No, sir.

Q. Then, didn't you go back there the next morning and get the check cashed? A. I presented that check at one time, No, sir. I presented that check once in that place, and that was in the morning.

Q. You didn't present it the night before? A. No, sir; I was in there the night previous to that trying to sell him a horse.

Q. I am talking about the time you went in there to get the check cashed. A. I presented that check once.

Q. You didn't take it in there the night before? A. No, sir; not to my recollection.

Q. Well, I would like for you to say whether you did or not? A. I am not going to say whether I did or not. If I was positive I did I would say so. I don't propose to lie on the stand, sir.

Q. So you don't know whether you did or not? A. If I did, I am innocent of it as you are.

Q. If you took it in there the night before you don't know it? A. I don't know it, sir.

Q. You remember everything else you did that night, don't you? A. Yes; I remember pretty well everything else I done.

208 (The witness was here excused.)

Mr. BAKER: If your honor please, I now ask the permission of the court to examine Mr. Donahoe, the notary public who took the affidavit of Mr. Kieny, and also we ask permission to examine the two ba-liffs who had charge of the jury. The juror, Mr. Kieny, didn't appear. We summoned him. He was here yesterday, you know, but he didn't appear. We have the notary here. Mr. Simmons makes an affidavit that he gave the notary $2.00. We desire to find out from the notary who got the two dollars.

The COURT: Very well.

Thereupon CLARENCE F. DONOHOE was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Will you state your full name? A. Clarence F. Donohoe.
Q. You are a notary public? A. Yes.
Q. Did you take the affidavit of Mr. Kieny? A. Yes.
Q. What fee did you receive for it? A. Twenty-five cents.
Q. Was there any money paid? A. Why, Mr. Simmons stayed there for about ten minutes talking. Nothing relative to the case, but he was acquainted with my father, and he was talking over old times, and as he left the office, he says, "I have taken up a good deal of you gentlemen's time; here is a couple of dollars; go to the theatre and enjoy yourselves."
Q. Who was he talking to, then? A. He was talking to the two of us.
Q. Was Mr. Kieny there? A. Mr. Kieny was sitting down and I was behind the counter, and he threw the money on the counter.
209 Q. Who got the two dollars? A. Mr. Simmons left, and Mr. Kieny took up the money.
Q. That was all was it? A. Yes, sir. Mr. Kieny stayed there ten minutes, and he said, "Will you go downtown."
Q. When was the money thrown down on your table—before the affidavit was sworn to or afterwards? A. About ten minutes afterwards.
Q. Anything said about money before that time? A. No, sir.
Q. What time in the day or evening was it, Mr. Donohoe? A. I should judge it was seven o'clock in the evening, or a little after.
Q. And who came for you to—— A. Why, Mr. Kieny and Mr. Simmons drove down in the carriage, just as I was coming out of my house, and Mr. Kieny said he wanted me to—they all got out of the hack, and he says, "I am looking for you; I want you to make an affidavit."
Q. Were you acquainted with Mr. Kieny? A. I have known Mr. Kieny for ten years.
Q. Where did you go then? A. To my office on East Capitol street.
Q. Who went with you? A. Mr. Simmons and Mr. Kieny. I got in the carriage with them.
Q. And there Mr. Kieny made oath to the paper? A. Yes, sir.
Q. Made oath before you? A. Yes, sir.
Q. And you certified it? A. Yes, sir.
Q. Then, what was done with it? A. Mr. Simmons put it in his pocket.
Q. Now, how long did you say you stayed there to talk after that? A. Well, Mr. Simmons stayed there ten or fifteen minutes, I should say. I stayed there the balance of the evening.

210 Q. What were you talking about? A. Well, about building and business. We are building a new office there, and business in general—real-estate business.

Q. Whose business were you talking about? A. Mr. Donohoe's business.

Q. Your father's? A. Yes, sir.

Q. How long have you known Mr. Simmons? A. Well, we have had business transactions with Mr. Simmons ever since I have been with Mr. Donohoe.

Q. And as, you say, Mr. Simmons was leaving, he threw two dollars down on the table and said what? A. On the counter, and he said, "I have taken up a good deal of your time; you fellows can go to the theatre with this and enjoy yourselves."

Q. Where did he throw the money? A. On the counter.

Q. Near to whom—where was it? A. Well, I was as close to it as anybody else.

Q. Well, what did you do with the money? A. Well, I gave it to—at least, Mr. Kieny picked it up and I didn't say anything about it.

Q. Where did you go then? A. I worked in the office the remainder of the evening, and Mr. Kieny stayed there possibly a half an hour, and he said, "Will you go out," and I said, "No, I have got to work."

Q. Why didn't you go? A. Well, I had to work.

Q. Why didn't you use the money as Mr. Simmons had suggested? A. Well, Mr. Kieny had been out of work for some time, and I thought it was more valuable to him than it was to me.

Q. So you let him take it? A. Yes, sir.

By the COURT:

Q. Had the twenty-five cents been paid to you? A. That was paid just as soon as the affidavit was taken.

211 Cross-examination.

By Judge COLE:

Q. Do you remember whether Mr. Simmons had started to go out before he turned back and laid the money down? A. I could not say.

(The witness was here excused.)

Thereupon W. T. GARRISON was sworn and examined.

Direct examination.

By Mr. BAKER:

Q. Mr. Garrison, you are a bailiff, are you not? A. Yes sir.

Q. Did you have charge of the jury in the Keeley-Moore case? A. No, sir.

Q. Were you in the court-room? A. Yes, sir.

Q. Did you see the jury? A. Yes, sir.
Q. Did you see Mr. Searcy? A. Yes, sir.
Q. Did you see him on the last day of the trial? A. Yes, sir.
Q. Did he, at any time, on the last day of the trial appear to you to be under the influence of liquor? A. Not at all.
Q. You saw him in the court-room? A. Yes.
Q. Did you see him in the hallway or not? A. No; I never took any notice of the hallway.
Q. Just saw him in the court? A. Yes, sir.

Cross-examination.

By Judge COLE:

Q. Did you watch the jurors much? A. I didn't take very particular notice of them.
Q. Mr. Searcy, I suppose, might have been under the influence of liquor to a considerable extent and you not notice it? A. Yes, sir.

(The witness was here excused.)

Thereupon O. G. SUTLER was sworn and examined.

212 Direct examination.

By Mr. BAKER:

Q. Mr. Sutler, you are a bailiff, I believe? A. Yes, sir.
Q. A deputy marshal? A. Yes, sir.
Q. Did you have charge of the jury in the Keeley-Moore case? A. Yes, sir.
Q. Did you notice the jury on the last day of the trial? A. Well, not particularly.
Q. You saw them? A. Yes, I saw them.
Q. Did you see Mr. Searcy? A. Yes.
Q. Did you see him in the court-room? A. Yes.
Q. Did you see him go into the jury-room? A. Yes.
Q. Did you notice anything about him by which he appeared to be under the influence of liquor? A. I didn't pay particular attention to him. I didn't notice anything peculiar about him.
Q. Didn't notice anything peculiar about him? A. No.
Q. Was there anything peculiar or extraordinary, that went on in the jury-room that you know anything of? A. Not that I know of.
Q. You had charge of the jury upstairs? A. Yes.
Q. Are you the gentleman who handed the declaration to the jury? A. Yes.
Q. You did it out in the hall? A. Yes, the clerk handed it to me and I kept it until half past one, and I handed it to one of the jurors; I don't know whether it was the foreman or not.
Q. You saw Mr. Searcy in the hall, did you? A. Yes.
Q. And you saw him in the jury-room? A. Yes.
Q. And you saw him when he came down here? A. Yes.

Q. Now, was there anything in his appearance that attracted your attention? A. I didn't see anything.

Q. Was there anything that made you think he was under the influence of liquor? A. I didn't notice anything.

213 Cross-examination.

By Judge COLE:

Q. I don't suppose you noticed him particularly? A. Not especially; any more than any other of the jurors.

Q. And especially while he was sitting here and listening to the argument and the charge of the chief justice, I don't suppose you noticed him particularly? A. No; I was sitting over here in the corner, and I didn't notice him particularly.

Q. He may have been asleep and drunk and you not notice it? A. Yes; that may have been.

Q. I believe, after the charge, the jury went out and got lunch, didn't they? A. Yes; I believe it was agreed to by the court and counsel on both sides.

Q. Yes, but they went out and got lunch? A. Yes.

Q. You didn't see Mr. Searcy while he was gone for his lunch at all? A. No.

Q. And you didn't notice him any more particularly than you did the other jurors when he came back? A. No.

Q. Or when he went upstairs? A. No.

Q. And you were not in the jury-room, I suppose, while the jury were consulting of their verdict? A. Oh, no.

Q. You were outside in the hall? A. Yes.

Q. And I take it that you could not hear anything that was said in there—you could hear the voices, but you could not distinguish anything that was said, I suppose? A. If I did I could not remember a word of it.

Q. How long were the jurors gone out to lunch? A. I think they left the court-room at five minutes past one, and there was no time set in the court-room for them to return.

Q. Well, did they come in the court-room again? A. No, they didn't come in the court-room again. I told them, after they
214 got out in the corridor, to meet me in front of the court-room at half past one.

Q. And you met them there then? A. Yes, and all the jurors except one were there at half past one, and he was about five minutes late.

Q. And it was about twenty-five minutes to two when they all got together? A. Yes; I think that was Mr. Thomas.

(The witness was here excused.)

Judge COLE: If the court please, I sent for Mr. Taggart. I want to ask him a few questions. I understand he has not arrived at his office yet. We won't ask the court to delay on that account. We will go on with the motion, and when Mr. Taggart comes in I will

ask your honor to hear what he has to say of the matter, and I believe, now, that completes our opening of the case.

(Mr. Baker here addressed the court in support of his contention, and shortly thereafter Mr. Taggart appeared.)

Thereupon HUGH T. TAGGART was sworn and examined.

Direct examination.

By Judge COLE:

Q. Mr. Taggart, I would like to know whether you were present in the District attorney's office on one occasion, and possibly Mr. Lambert, and Mr. Searcy, were there, and an affidavit purporting to have been made by Mr. Searcy was being read? A. I was present at a meeting of that kind, but Mr. Searcy was not present at that time. He came in later.

Q. Well, did he come in during that interview? A. Well, it was after Mr. Baker had ceased reading the affidavit.

Q. Well, was it while Baker and the others were still there? A. Oh, yes; Mr. Lambert and Mr. Baker were still in the room.

Q. And the interview continued after Mr. Searcy came in? A. Yes.

215 Q. Now, can you tell us about what time that was? A. Well, I made no note of it, and can't give the day of the week, or the day of the month either, but it was very shortly after the motion for a new trial was filed.

Q. Can you say whether it was before the 20th of February? A. Oh, I think certainly before.

Q. Well, I wish you would state now whether there were statements in that affidavit to the effect that Searcy said that Jones and Simmons went around with him drinking here and there, and got him intoxicated, and got the affidavit out of him while he was intoxicated, or whether Searcy, after he came in, and in the conversation, used language to that effect? A. I don't think that he said they got him intoxicated, but my recollection is that either in the affidavit, or in the subsequent conference that took place there with Searcy, he did say, as I recollect it, in the effort to get this check cashed, that they had visited these saloons, and had drank.

Q. Visited the saloons and drank. A. That is my recollection of it.

Q. You are not certain whether that is in the affidavit, or whether it was said after Searcy came in? A. No, I can't state that.

Q. Did you read that affidavit yourself? A. I saw it in Mr. Baker's hands while he was reading it to the District attorney.

Q. You didn't have it in your own hands? A. I think not. At least, if I did I don't remember the circumstances now.

Q. Do you remember whether it stated that they all went into Buckley's? A. It seems to me that Buckley's was mentioned, and another place on Seventh street, and Jordon's, on Ninth street.

216 Q. Those three places? A. That is my recollection.

Q. And did he say that Mr. Simmons was along when that

occurred? A. I understood that the three of them were together and drank together in these three places.

Q. Do you remember what time you met Mr. Simmons the night that you understood that affidavit was obtained here at the city hall? A. Well, I can tell you about the night that Mr. Simmons showed me the affidavit.

Q. Well? A. We were in the Bar library, or, at least, I was, looking up some authorities upon some of the propositions of law that had become material during the case, and with the view to sustaining a motion for a new trial on the ground of supposed errors on the part of the presiding justice, and Mr. Simmons stated that he expected to get information about eight o'clock as to whether Mr. Searcy would admit that he had been under the influence of intoxicating drink at the time they were in the jury-room considering their verdict, and just before they retired. I did not at that time know how he expected to get the information, or through whom, or in what manner. He left the Bar library and came back about half past nine, and then had this affidavit in his possession. He handed it to me, and I read it over, and it then transpired that it was in Mr. Jones' handwriting. I asked him how Mr. Jones had become connected with the matter. He said that he had gone to Mr. Searcy's house for the purpose of seeing him in person, but had not succeeded, and that he had met Mr. Jones, and had asked Mr. Jones if he knew this man, and Jones said he did, and had known him for several years. Simmons then said that he asked Jones what sort of a fellow he was, and that Jones replied that he thought he
217 was a pretty good kind of a fellow but he thought he was addicted to drink. Whereupon, Mr. Simmons said he remarked to Jones, "Why, that's just the thing that I am looking up. He was on the jury that sat in a case that I tried a few days ago in the circuit court, and it has been said by some of his brother members of the jury that he was under the influence of liquor, and I would like to learn whether he is willing to concede or admit the fact; and that Jones said he would see him and ascertain what he would say about it;" and Simmons said that later in the day—this was in explanation of my question as to how Mr. Jones had become connected with the matter. He then told me that later in the day he had met Mr. Jones, and that Mr. Jones had said to him that he had seen the juror, and the juror said that there had been sickness in his house the night before; that he had been up there all through the night, and that he had taken some drinks, and had one at, I think, his breakfast, and the heat of the court-room, or what not, had proved to be too much for him. I read over his affidavit at that time, and I think that is about all that transpired.

Q. Now, what time in the evening was it that Mr. Simmons came back with that affidavit? A. I think Mr. Simmons went away about eight o'clock, and was back at the city hall, certainly not later than half past nine. He and I subsequently went down and got on the car on our way home, about eleven o'clock.

Q. You understood subsequently that when he went out he was

going out to see what information Jones had in relation to it? A. Yes.

Q. When he came back he brought the affidavit of Searcy that he filed in support of the motion for a new trial? A. Yes, the same one.

Q. Was there any conversation between you and Mr. Simmons at that time as to what he had paid Jones for his services?

218 A. Yes; he told me that he had paid Jones $30, and I remember remarking to him that I thought that was a rather stiff sort of a price to pay for a service of that kind, and he said to Mr. Jones—that he had said as much to Mr. Jones himself, but Mr. Jones said he had been on the business all day, and had been away from his office, and he didn't think it was unreasonable, and that Mr. Simmons stated that he didn't have any contract with him, or any agreement, and so he paid him.

Cross-examination.

By Mr. BAKER:

Q. Mr. Taggart, you remember that you were with me in the District attorney's office in the morning, and then in the afternoon Mr. Jones came there. Do you remember that? A. I don't remember the morning, but I remember when they sent for me, and you were in there reading the affidavit. You had then progressed with it how far I don't know. Oh, I don't say, Mr. Baker, that I was not in there in the morning. Perhaps you can refresh my memory.

Q. You say I had read a line of the affidavit when you came in? A. You were reading the affidavit when I came in the room.

Q. Now, you remember that Mr. Searcy said that Mr. Simmons paid for some drinks, but he could not remember whether or not Mr. Simmons went into the saloons? A. Why, Mr. Baker, I distinctly remember, after the whole thing was over, a discussion of the question as to whether Buckley's and Jordan's, and this other place, waited upon colored men at all, and it was advanced as an element of improbability in Searcy's story, and somebody acknowledged that they did not.

Q. Do you remember the Sunday morning, after the affidavit was filed, that I met you and Mr. Simmons in the District attorney's office? A. Yes, I think I remember that.

219 Q. Do you remember Mr. Simmons telling me that he had never seen Searcy, but that somebody else got him the affidavit? A. No; I can't say that I remember that. I never understood that there was any question about Simmons' meeting him. Simmons told me that he met him unexpectedly, when he went to Jones' office. He didn't expect to see him there, but when he went he found Searcy there. He also told me what transpired—what he said to him.

(The witness was here excused.)

Judge COLE: If your honor please, I would like to ask Mr. Searcy a single question.

Mr. BAKER: You can.

Thereupon ROBERT P. SEARCY was recalled, and resumed the stand.

Cross-examination.

By Judge COLE:

Q. Mr. Searcy, I would like to have you produce that affidavit—that first affidavit that you made, which Mr. Taggart has just been speaking of having heard read in the District attorney's office. Will you be kind enough to do it? A. To produce the affidavit?

Q. Yes, that first affidavit you made either in Mr. Baker's office, or at their instance, or at your own instance, that was read in the District attorney's office. I would like the court to have it. A. I haven't got the affidavit, sir.

Q. Well, where is it Mr. Searcy? A. I don't know sir, but if the court will allow me I can refer to the affidavit that was made——

Q. No, I don't care for that. I would like the paper itself, Mr. Searcy. A. I haven't got the paper itself, sir.

Q. Where is it? A. I have never had it in my possession, I have never read it, and I have never had it in my hand.

220 Q. Why did you make oath to it without reading it? A. I did.

Q. You made oath to it without reading it? A. I did. But if the court would allow me I would say that the paper that I made oath to Mr. Simmons dictated it.

Q. But I am not talking about the affidavit that you made for Mr. Simmons. I am talking about the affidavit that you first made when this matter was first called to your attention, and the affidavit that Mr. Taggart has been talking about, that was read in the District attorney's office. The first affidavit you made after you made the one for Mr. Jones and Mr. Simmons? A. I didn't make an affidavit in the District attorney's office. I only made a statement, and I don't know that there was an affidavit present at all.

Q. Didn't you go before Rutledge Willson and make oath to a paper in relation to this matter? A. Before whom?

Q. Rutledge Willson, a notary public, who has an office down there near Mr. Baker's office. A. I don't know Mr. Willson, sir.

Q. Well, didn't you make an affidavit in Mr. Baker's office on the 12th of February? A. I did. The 12th or 13th; somewhere along there.

Q. Well, that is the affidavit I am talking about? A. No, sir; I am not in possession of it.

Q. You are not in possession of it? A. No, sir.

Q. Can you tell us where it is? A. I cannot.

Q. To whom did you deliver it? A. I made an affidavit before the notary public. I don't know whether the notary kept it, or whether Mr. Baker kept it, or who.

Q. Where were you when you made it—in Mr. Baker's office? A. Yes, sir.

221 Q. And did you leave it there in Mr. Baker's office when you left? A. I don't know whether I left it there, or whether the notary public taken it, as I said before.

Q. Well, it was either left in Mr. Baker's office, or the notary public took it with him, you don't know which? A. I don't know which. I presume one of the two had it.

Q. Now, do I understand you to say that you haven't seen that paper since—after you signed that paper that you made oath to on the 12th of February? A. I haven't had it in my hands, sir.

Q. Well, have you seen it? A. I can't say that I have seen it, because I didn't read it over. I only made the affidavit, and then it was read over to me. It was in keeping with what I had said.

Q. I am not asking you about that. I would like to find out the locality of that paper? A. I don't know anything about it, sir.

Q. Can you tell me whether you have seen it since the day you swore to it? A. I think the paper was produced here yesterday. The affidavit that I made was produced here in court and read.

Q. You made a subsequent affidavit on the 20th of February, didn't you? The affidavit that was read here yesterday of yours was made on the 20th of February, wasn't it? A. I don't know, sir.

Q. Well, it is not that one I am talking about. The first one you made. Where is that? A. I don't know, sir.

Q. You have no idea? A. No, sir; I presume——

Q. You haven't seen it since the day you made oath to it—is that true? A. I haven't seen it since the day I made oath to it, unless that was the one that was here yesterday—on file here yesterday.

Q. Unless that is the one, you haven't seen it since? A. No sir, not to my knowledge sir.

222 And thereupon the motion for a new trial was argued and submitted and fully considered by the court, and the court, held that while there appeared to be a conflict of evidence as to irregularity in the jury-room, still there was not sufficient to warrant him to disturb the verdict, as there was no evidence of any misconduct on the part of one or more of the jurymen that would warrant a setting aside of the verdict, and that it also appeared that such misconduct or impropriety did not enter into or affect the verdict, and that the verdict appeared to be sustained by the evidence, to which ruling the plaintiff- excepted, and thereupon the motion for a new trial was overruled and judgment entered upon the verdict.

And before the jury retired to consider their verdict each and all the exceptions (except the ruling on the motion for a new trial on the grounds of the misconduct of the jury) were taken, and noted by the court in its minutes during the trial, and are embraced herein; and the exceptions to the ruling upon the questions of the misconduct of the jury were taken and allowed by the court when said ruling was made; and the plaintiffs thereupon present this their bill of exceptions, containing the rulings, and instructions of the court and the evidence bearing thereon and request the court to

sign and seal the same, which is accordingly done *munc pro tunc* this 17th day of July, 1902.

The charge of the court and the remarks, purporting to be made by counsel at the end thereof, were inserted in the bill of exceptions at the request of the defendants and over the objection of the plaintiff-.

Counsel for the defendant- object to the remarks at the end of the bill of exceptions, as to what was put in the record at the suggestion of counsel for the defendant.-

E. F. BINGHAM,
Chief Justice.

223 *Memorandum.*

July 17, 1902.—Time to file transcript in Court of Appeals further extended to Sept. 1, 1902.

Instructions to Clerk for Preparation of Transcript.

Filed July 23, 1902.

In the Supreme Court of the District of Columbia.

ANDREW C. KEELEY, Trustee, ET AL.
vs.
JOSEPH H. MOORE ET AL. } Law. No. 43324.

The clerk in preparing this transcript for the appeal in this case, will include the following:

Declaration, pleas. Mem. of verdict. Judgment. Mem. of appeal. Order to settle exceptions. Mem. Bond filed. Mem. Bill of exceptions submitted. Mem. extending time to file transcript. Order making bill of ex. pt. of record. Bill of exceptions. Mem. Time for filing transcript extended to Sept. 1, 1902.

SIMMONS, COLE & TAGGART,
Attorneys for Appellants.

224 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 223, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 43324, at law, wherein Andrew C. Keely, trustee, *et al.* are plaintiffs, and Joseph H. Moore *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 2nd day of August, A. D. 1902.

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN, *Ass't Cl'k.*

Endorsed on cover: District of Columbia supreme court. No. 1243. Andrew C. Keely, trustee, *et al.*, appellants, *vs.* Joseph H. Moore *et al.* Court of Appeals, District of Columbia. Filed Aug. 4, 1902. Robert Willett, clerk.

WEDNESDAY, *April* 22*d*, *A. D.* 1903.

ANDREW C. KEELY, Trustee, and RICHARD K. PAYNTER, Appellants,
vs.
JOHN H. MOORE, EDWARD J. STELLWAGEN and THOMAS M. GALE, Trading as Thomas J. Fisher and Company; Mary Cecelia Thomson and Georgiana Hawkes Thomson. } No. 1243.

The argument in the above entitled cause was commenced by Mr. H. T. Taggart attorney for the appellants.

THURSDAY, *April* 23*d*, *A. D.* 1903.

ANDREW C. KEELY, Trustee, and RICHARD K. PAYN-ER, Appellants,
vs.
JOHN H. MOORE, EDWARD J. STELLWAGEN and THOMAS M. GALE, Trading as Thomas J. Fisher and Company; Mary Cecelia Thomson and Georgiana Hawkes Thomson. } No. 1243.

The argument in the above entitled cause was continued by Mr. H. T. Taggart attorney for the appellants and by Mr. D. W. Baker attorney for the appellees and was concluded by Mr. C. C. Cole attorney for the appellants.

ANDREW C. KEELY, Trustee, and RICHARD K. PAYNTER, Appellants,
vs.
JOSEPH H. MOORE, EDWARD J. STELLWAGEN and THOMAS M. GALE, Trading as Thomas J. Fisher and Company; Mary Cecelia Thomson and Georgiana Hawkes Thomson. } No. 1243.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is a suit in ejectment to determine the title to a piece of real estate in the city of Washington, known as lot numbered 23, in Davidson's subdivision of lots in square numbered 166, which in the year 1887 and prior thereto was the property of one William Thomson. The appellants, who were the plaintiffs in the court below, represent a number of the heirs at law of William Thomson, and the appellees, Mary Cecelia Thomson and Georgiana Hawkes Thomson, who were defendants in the court below, are in possession of the property as devisees under a will executed by William

Thomson. The other appellees are merely their agents, and have no substantial interest in the property. The question in controversy is that of the validity of the will of William Thomson.

William Thomson appears to have been a resident of this city, when some time prior to the year 1885 he was appointed consul for the United States at Southampton, in England. He had as vice-consul at the same place one John H. Cooksey, a merchant of Southampton On December 15, 1885, William Thomson was committed to a private insane asylum in England as a lunatic upon the certificates of two physicians and the request of a cousin, one James E. Cunningham, a merchant of London, who seems to have taken temporary charge of his affairs. He remained in the asylum until February 1, 1886, for a period of a month and a half, when he was discharged as probably cured, or rather, as the expression was used, was granted leave of absence on probation. The probation seems to have proved satisfactory, for he never returned to the institution, and there was a formal discharge entered on the records of the asylum on June 26, 1886.

On February 24, 1886, which was a little upwards of three weeks after his discharge from the insane asylum on probation, William Thomson, at the office of Walter R. Lomer, a solicitor resident in Southampton, executed a will which he had caused to be prepared for him by Lomer, and whereby, among other devises and bequests, he devised the property here in controversy to the appellees, Mary Cecelia Thomson and Georgiana Hawkes Thomson, spinsters, of the county of Kent, in England, jointly for their joint lives, and to the survivor of them, with remainder to Mary Cunningham Roberts, of London, for life, and remainder in fee to her only son, then about 10 years of age. The will, according to its own recital, was contained in two sheets of paper, to each sheet of which the testator signed his name; and it is testified also to have been executed in duplicate. Attached to the will was the usual attestation clause for witnesses, and this attestation clause was signed by Walter R. Lomer, who had prepared the will, and by Richard Roupe Linthorne, at the time a clerk in his office, both of whom attached their signatures in the presence of the testator and at his request.

The testator, it seems, owned real estate both in England and in America, some in New York and some in this District, besides a large amount of personal property, and the attestation mentioned was sufficient to make the will effective for the conveyance of real estate in England under the existing law of that country, as also for the conveyance of real estate in the State of New York.

On the day after this execution and attestation of the will, William Thomson again went to the office of the soli citor, Walter R. Lomer, to have a certificate written upon the will, which was to be signed by John H. Cooksey, the vice-consul o f the United States at Southampton. Lomer wrote, or caused to be written, the desired certificate upon each copy of the will, and delivered back the duplicates to Thomson, who thereupon went before the vice-consul, and

the vice-consul executed the certificate. The certificate was written on the second and last page of the will, and it is said "in the margin" of it; but whether this means alongside of any other writing, or at the end of the will, does not very clearly appear from the record. This certificate, upon the efficacy of which really depends the controversy between the parties, was in the following terms:

"I hereby certify that William Thomson, consul at Southampton for the United States of America, attended before me on this 25th day of February, 1886, and acknowledged the foregoing paper writing contained in two sheets of paper as his last will and testament, and that the signature William Thomson at the foot thereof is in the proper handwriting of the said William Thomson."

(Signed) "JOHN H. COOKSEY,
"*Vice-Consul of the United States of America.*"

William Thomson died in the next year (1887), and apparently in January of that year, and apparently also while yet in the performance of his duties as consul, although this does not definitely appear from the record before us. On January 25, 1887, the will already referred to was admitted to probate in the principal registry of the probate, divorce, and admiralty division of the high court of justice in England. One of the duplicate copies is stated upon information and belief to have been sent "to the probate court at New York, United States of America," but it is not further traced; nor does it appear whether it was there admitted to probate and record. The duplicate original admitted to probate in England is the document which figures in this case, together with a duly-certified copy thereof which has been offered in evidence in the proceedings, and a transcript and photographic copy of the certificate signed by Cooksey.

William Thomson left no children or descendants, and was never married; nor had he any brothers or sisters, or descendants of such. His nearest living relatives at the time of his death were some first cousins, the children of an uncle, David Thomson, and of an aunt, Ann Haig. He himself was born in the United States and always remained a citizen thereof. The children of his uncle, David Thomson, who lived and died in Great Britain, are the two appellees, Mary C. Thomson and Georgiana Hawkes Thomson, who are themselves aliens. Ann Haig, the aunt of the testator, was a citizen of the United States, and left numerous descendants who are enumerated in the record, but whom it is not necessary here to mention. They claim, as the heirs at law of William Thomson, to be entitled to the property in dispute. A number of them, representing an ownership of ninety-one one-hundredths part of the property, have united in a deed of conveyance to the two appellants, bearing date on March 22, 1899, whereby, for a nominal consideration, they purport to convey one undivided fourth part of the property to the appellant, Richard K. Paynter, in his own right and for his own use,

and the remaining undivided three-fourths part to the appellant, Andrew C. Keeley, in trust to recover the property for them, to sell the same, and to divide the proceeds of sale among the grantors. It is conceded that the appellants, plaintiffs in the court below, have acquired and hold the title of all the descendants of Ann Haig to the property involved in this suit, excepting nine one-hundredths part thereof.

After the execution of the deed to them of March 22, 1899, the appellants Keeley and Paynter instituted suit in ejectment in the supreme court of the District of Columbia on September 7, 1899, first against the appellees Joseph H. Moore, Edward J. Stellwagen, and Thomas M. Gale, the two latter doing business under the firm name of Thomas J. Fisher & Co. It seems that Joseph H. Moore was a tenant in possession of the property, and the firm of Thomas J. Fisher & Co. merely the agents of Mary Cecelia Thomson and Georgiana Hawkes Thomson for the renting of it. Afterwards the two appellees last named were admitted on motion as the defendants to the suit.

At the trial it was agreed, as already stated, that the plaintiffs held the title of all the descendants of Ann Haig to the property involved in the suit, excepting nine one-hundredths undivided part thereof; and that the defendants were in possession of the property under an alleged will of William Thomson. Upon this the plaintiffs rested in their case in chief.

The defendants thereupon proceeded to prove the will of William Thomson. The original, probated in London and retained in the registry of the court there, was not available to be produced upon this trial; and recourse was had to secondary proof of its execution and contents. Two of the witnesses, Lomer and Linthorne, were yet living, and their testimony was taken by deposition. It is sufficient to say, in regard to this testimony, that the witnesses testified fully and unequivocally to the due execution of the will in their presence and their attestation of it, and to the mental capacity of William Thomson at the time to make it. Lomer and Linthorne also testified to the writing of the added certificate in their office. John H. Cooksey, the vice-consul, had died in 1895; but his son, who was examined as a witness by deposition, testified to the genuineness of his father's signature attached to the certificate. He also testified that he knew William Thomson well; and that in February of 1886, when Thomson came to see his father about the will, he was perfectly sane and in good health.

The contents of the certificate attached to the will were stated by one of the registers of the probate office who had the custody of it, and were set forth in his deposition verbatim from the original paper. A photographic copy of it was also proved by him and others, and was admitted in evidence, although objected to by the plaintiffs. This same witness also testified to the correctness of a certified copy of the will and which was annexed to the interrogatories propounded to him, marked as "J. D. V. 2," and he stated that he had compared

it with the original will, and that it was correct, word for word, and in every particular. And this paper also was admitted and read in evidence over the objection of the plaintiffs. An identically similar copy was subsequently introduced in evidence by the plaintiffs themselves in rebuttal. This was substantially the case made for themselves by the defendants.

The plaintiffs, in their cross-examination of the witnesses for the defense, and in their own testimony in rebuttal, attacked the validity of the will on three several grounds: (1) That its attestation was insufficient to give it efficacy for the conveyance of real estate in the District of Columbia; (2) that William Thomson was of unsound mind at the time of its execution; (3) that its execution had been procured by the exercise of undue influence upon the testator by James E. Cunningham, one of the four persons named in the will to be the executors, and others. There is no testimony, however, in the record of any such undue influence; there is testimony in regard to unsoundness of mind on the part of the testator; but there is no testimony in rebuttal in regard to the matter of attestation further than was already developed in the course of the testimony for the defendants.

At the conclusion of the testimony, the defendants requested six several instructions to the jury, which were granted over the objections of the plaintiffs. By the plaintiffs eight instructions were requested,—of which two, the sixth and eighth in the series, were rejected; two, the third and fifth, were given with modifications, and the others were given as requested. Exceptions to the instructions were reserved on both sides. Then the court charged the jury of its own motion. The charge took the instructions which were allowed as a text, and merely gave them with some comments. There was no exception by either side to the charge.

The jury returned a verdict for the defendants.

Thereupon there was a motion for a new trial filed, supported by affidavits and antagonized by counter affidavits, in which sensational charges were made of alleged misconduct on the part of some members of the jury and other persons connected with the case. Thereupon the members of the jury and others were summoned into court, and examined and cross examined orally; and as a result of the investigation the court declined to disturb the verdict or to award a new trial. To this ruling the plaintiffs excepted.

Judgment was then entered upon the verdict for the defendants, and the plaintiffs appealed to this court.

1. Twenty-two exceptions were noted by the plaintiffs to the rulings of the trial court, some of them reserved to the action of the court in the admission and exclusion of testimony, and some addressed to the action of the court in respect of the instructions granted or refused; and upon these twenty-two exceptions they base twenty-three assignments of error. Most of these we deem it unnecessary to consider in detail or at any length. We think that there is only one substantial question in the case for our considera-

tion, and that is the question of the sufficiency in law of the attestation of the will of William Thomson as a conveyance of real estate in this District.

In the year 1886 when this will was executed and thereafter until the adoption of the present code, which went into effect on and after January 1, 1902, at least three witnesses were required for the attestation of a will in order to render it effectual as a conveyance of real estate. The attestation here consists of that of two witnesses, which is conceded to be regular and sufficient, and of a certificate signed by a third person, the efficacy of which is controverted. The determination, therefore, of the question and of the controversy in this case depends upon the view to be taken of this certificate as an act of attestation. We think that the question is solved for us by the doctrine stated by the Supreme Court of the United States in the case of Adams *v.* Norris, 23 How. 367. That case, it is true, arose in California under the Mexican or Mexican-Spanish adaptation of the Roman civil law then in force in that part of our Union, but the rule laid down by the court is of general application.

In the case of Adams *v.* Norris there appeared a will, which immediately after the signature of the testator had the following words:

"Before me, in the absence of the two alcaldes.—Roberts T. Ridley, Sindico. Witnesses: Nathan Spear, Guillermo Hinckley."

There was question whether, under the law and usage of the country, a will, in order to be effective, required three or only two witnesses. It was treated in both aspects, both by the trial court and by the Supreme Court of the United States. With reference to the possible requirement of three witnesses the latter tribunal said:

"We comprise among the witnesses to the will Ridley, the sindico. It does not appear that a sindico was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor is it clear that the sindico in the present instance expected to give any sanction to the instrument by his official character. He attests the execution of the will, and we cannot perceive why the description of himself, which he affixes to his signature, should detract from the efficacy of that attestation."

The action of Sir William Grant, master of the rolls, in the case of Clarke *v.* Turton, 11 Vesey, Jr., 240, which is cited by the plaintiffs in support of their contention, but which in our opinion does not sustain it, is entirely consistent with the ruling of the Supreme Court in the case of Adams *v.* Norris, and is indicative of the distinction that should be taken in all such cases. The case of Clarke *v.* Turton was a suit in equity to establish a will, to which one of the signatures of the three witnesses who were claimed to have attested it was, as in the present case, that of a vice-consul resident in some foreign country where the will appears to have been executed. There was objection to the establishment of the will on several grounds. One of these, as stated in the exceedingly brief report which we have of the case, is thus stated:

"Another objection was taken to the execution of the will—that the third signature was that of the vice-consul, the will being executed abroad, and the attestation of some such public officer is considered necessary to the validity of the act;—that the attestation in this instance was a memorandum by the vice-consul to operate as a certificate, a separate act in his official character, and sealed with his official seal; and therefore it could not be said he subscribed as a witness."

It is stated that the master of the rolls sent the case to be tried at common law upon this objection; but we are not advised by the report what the result was, or what ultimate disposition was made of the case. Nor did the master of the rolls himself express any opinion as to the merits of the objection. But the distinction pointed out is, that when the certificate of an official person as such is attached to a will, and such official certificate is required by the law, it is not to be regarded as of itself an act of attestation. But neither by our law nor by the law of England is a vice-consul charged with any function in regard to the execution of wills. He is, it is true, charged with the authority to take acknowledgments of deeds; and it may have been that in this case he was called upon to certify to the will through some mistaken idea that his functions also comprised the taking of acknowledgments of wills. But his official act can add nothing to the efficacy of a will; nor does the absence of an official certificate detract in any manner from its validity. The certificate here in question is utterly meaningless and utterly without force or significance of any kind, unless it be taken as an act of attestation. And yet that it was intended by the parties to it that it should have some force and effect is beyond all doubt.

It is the well-established rule of law that all legal documents and instruments of writing, deeds, wills, bonds, and all others, must, if possible, be so construed as that they shall be given due effect, and not receive a construction which would render them meaningless. Foxcraft *v.* Mallett, 4 How. 353; Smith *v.* Bell, 6 Pet. 68; 17 Amer. and English Encyclopædia of Law, 2d edition, p. 18, and cases there cited. The certificate of John H. Cooksey in the present case is valueless for any other purpose than as an act of attestation. If it is to receive any efficacy whatever, it must be as an act of attestation. And we see no reason on the face of it why it should not receive that construction. In express terms, as far as it goes, it purports to be an act of attestation, and nothing else. It purports to recite that the testator, William Thomson, attended before the subscriber on a certain specified day, and acknowledged the document, to which the then unexecuted certificate was affixed, to be his last will and testament, and the signature thereto to be in his handwriting. These are elements of an act of attestation. The certificate is plainly the equivalent of a statement that the testator in the presence of the subscriber declared that the instrument was his last will and testament. The only element of an attestation wanting is that it is not stated to have been signed by the subscriber as a wit-

ness at the request of the testator. But if no formal words of attestation are required at all, as they are not under our law, certainly an imperfect certificate of attestation can not vitiate the whole transaction. Rather will the omission be supplied by reasonable presumption; and it may well be presumed here that Thomson came to Cooksey to get him to sign what he actually did sign.

It is the well settled law that when any of the witnesses to a will has died, proof of his signature is sufficient *prima facie* proof of attestation of the will by him. *Robertson v. Pickrell*, 109 U. S. 608; McCormick *v.* Sullivant, 10 Wheat. 192; Darby *v.* Mayer, 10 Wheat. 465. Otherwise there could in most cases be no probate of wills where one or more of the witnesses had died; and especially would such probate be difficult or impossible where all the witnesses had departed this life. In the present instance Cooksey appended his signature apart from the other witnesses, and with or without the certificate it would have been impossible to prove his attestation of the will otherwise than by proof of his signature and the presumptions which naturally arise therefrom. Now, if such proof and presumptions would supply all the elements of an attestation, it is difficult to see why they would not supply the defects of an imperfect clause of attestation. Nor, in view of the case of Adams *v.* Norris, heretofore cited, is it apparent how the addition to his signature of an unnecessary designation, such as that of vice-consul was in this case, could have detracted from the legal efficacy of his act any more than a statement of his place of residence.

It is to be noted that it was left to the jury in this case to consider all the circumstances and to find what was the fact. It was left open to them to disregard the presumptions if they found any facts in the case to rebut them. This was more favorable to the plaintiffs than they were entitled to have it in view of the condition of the testimony; but they at least had no reason to complain of the submission of the matter to the jury. The jury found the presumptions and the facts against them, and we think that they found rightly.

We conclude, therefore, that the will of William Thomson, with the certificate appended thereto of John H. Cooksey, was sufficiently executed for the conveyance of real estate in this District, and that both the will and the certificate were properly admitted in evidence in this case.

2. As we have intimated, it would subserve no good purpose, and we do not deem it necessary to enter into any elaborate consideration of the other assignments of error or of the exceptions upon which they are founded. They raise no questions of law that have not been fully settled by the authorities.

For example, to the general interrogatory appended at the conclusion of the commission sent to take the testimony of Septimius Cooksey, son of John H. Cooksey, in England, and which is the usual interrogatory in all such cases, whether the witnesses could state anything else pertinent to the issues between the parties, the

witness, whose previous testimony had been addressed exclusively to the proof of his father's signature to the certificate annexed to the will, here said that he recollected the occasion when William Thomson came to see his father about his will, and that at that time, as far as the witness could judge, Thomson was perfectly sane and in good health. Exception was taken to the admission of this interrogatory and answer; but plainly the question was proper and the answer was relevant to the issue. The plaintiffs do not claim to have been surprised by either, but only to have had no opportunity for cross-examination. But no doubt the opportunity would have been afforded if application therefor had been duly made.

Similarly interrogatories were propounded to the register of the probate court in London, who had the official custody of the will of William Thomson among other wills, and he was requested to state whether it was on file in his office, whether it had been admitted to probate, whether the Cooksey certificate appeared on it, what the contents were of this certificate, and whether a certified copy of the will which was attached to the interrogatories was a correct copy of it. To the allowance of each and all of the questions and of the answers of the witness to them exception was reserved by the plaintiffs, and these exceptions have been brought here by assignments of error thereon. But it is well settled that this is a proper mode for the proof of documents and their contents when the documents themselves are beyond the jurisdiction of the court.

In the testimony of the plaintiffs in rebuttal it was sought to introduce testimony plainly of a hearsay character, including the certificates of the physicians for the commitment of William Thomson to the insane asylum; but insanity is not to be proved in this way, and these certificates were clearly inadmissible, especially in view of the fact that it does not appear why the testimony of the physicians themselves might not have been taken. So also declarations made to some of the witnesses by third parties were also excluded. And this, of course, was evidently proper. Neither in the matter of the exclusion or admission of testimony, nor in the matter of the instructions which were given or rejected, or given with a modification, do we find any reversible error. The rulings of the court were eminently right and just throughout the whole trial.

3. Of one exception, perhaps, special consideration is demanded. It is an exception to which usually no consideration whatever can be given in an appellate tribunal,—that which was taken to the refusal of the trial court to grant a new trial in the case.

Besides the usual formal reasons, the motion for a new trial here was founded upon serious charges of misconduct on the part of one or more of the jurors during the trial and principally in the consultation room after they had retired to deliberate on their verdict. The principal charge was that one of the members of the jury was during all this time under the influence of intoxicating liquor and thereby incapacitated from rational deliberation; and this charge developed counter charges of subornation of perjury on the part of

persons other than members of the jury. Numerous affidavits were filed in connection with the matter; and the court authorized and permitted an oral examination of several of the jurors and of some other persons more or less connected with the case. To the proceedings in connection with the motion an unusually large portion of the record before us is devoted. They occupy 56 out of 129 printed pages, or nearly one-half of the whole record. The result of the investigation, in the language of the bill of exceptions, was that "the court held that, while there appeared to be a conflict of evidence as to irregularity in the jury room, still there was not sufficient to warrant him to disturb the verdict, as there was no evidence of any misconduct on the part of one or more of the jurymen that would warrant a setting aside of the verdict, and that it also appeared that such misconduct or impropriety did not enter into or affect the verdict, and that the verdict appeared to be sustained by the evidence."

To this ruling the plaintiffs excepted, and the exception is now urged upon our consideration.

In view of the gravity of the charges advanced, and in view of the fact that such misconduct as has been here asserted tends to pollute and poison the fountains of justice, which should be rigidly guarded from such contamination, we have carefully considered the proceedings as detailed in the record, but we find no reason to dissent from the ruling of the learned justice who presided at the trial. The alleged misconduct after all is a contested question of fact. The justice of the trial court, after apparently careful, painstaking, and conscientious investigation, has found the charge not proved, and it is not apparent that in such a case an appellate tribunal should interfere with the finding.

It seems to be established by the decisions of the Supreme Court of the United States and other tribunals that, while ordinarily the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed—that is, the trial court—and the result cannot be made the subject of review by writ of error (Newcomb *v.* Wood, 97 U. S. 581; Henderson *v.* Moore, 5 Cranch. 11), yet there are or may be exceptions to the rule, and among these exceptions are some cases of misconduct on the part of the jury and others connected with the jury which the trial court has refused to consider or has erroneously considered upon an uncontested state of facts. Clyde Mattox *v.* United States, 146 U. S. 140; United States *v.* Reid, 12 How. 361; Perry *v.* Bailey, 12 Kans. 539; Woodward *v.* Leavitt, 107 Mass. 453.

In the case of Mattox *v.* United States, the Supreme Court of the United States by Mr. Chief Justice Fuller, after stating the general rule, said:

"But in the case at bar the District court excluded the affidavits, and in passing upon the motion did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved. * * * We should,

therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court."

In the case of Perry *v.* Bailey, 12 Kan. 539, in which the judgment and opinion of the supreme court of Kansas were delivered by Mr. Chief Justice Brewer, now one of the justices of the Supreme Court of the United States, and which is cited with approval by the latter court in the case of Mattox *v.* United States, it was proved and practically conceded in the trial court, for there was no countervailing testimony, that one of the jurors was under the influence of liquor in the jury room and thereby incapacitated from participating intelligently in the deliberations of his associates on the jury, and yet the trial court refused to set aside the verdict. This was assigned as error, and the supreme court of Kansas on this ground reversed the judgment and directed a new trial. And it was held that such action was necessary in order to preserve the administration of justice from the false taint of corruption at a most vital point.

The present case is easily distinguishable from those which have just been cited. Here not only were all the affidavits that were offered received and considered, but a lengthy and searching oral investigation was had before the court of the alleged acts of misconduct on the part of members of the jury. The trial court, therefore, differently from the case of Mattox *v.* United States, gave full and conscientious consideration to the alleged acts of misconduct and found that they were not sustained by the testimony. So, also, is there a sharp distinction between this case and that of Perry *v.* Bailey. For, although the principal alleged act of misconduct here on the part of a member of the jury was identical with that in the case of Perry *v.* Bailey, that is, gross intoxication, yet there the fact of intoxication was proved and admitted and the court refused to take proper action on it, while here the charge after full investigation has not been sustained. If the testimony failed to sustain the charge—and of that the trial court was the best judge—it is difficult to see how that court could properly have done otherwise than deny the motion for a new trial, so far as the matter of misconduct of the jury was concerned.

We are of opinion that there was no reversible error in the rulings of the trial court in this case, and therefore that the judgment appealed from should be affirmed, with costs.

And it is so ordered.

WEDNESDAY, *May 6th, A. D.* 1903.

ANDREW C. KELLY, Trustee, and Richard K. Paynter, Appellants,
vs.
JOSEPH H. MOORE, EDWARD J. STELLWAGEN and Thomas M. Gale, Trading as Thomas J. Fisher and Company; Mary Cecelia Thomson and Georgiana Hawkes Thomson. } No. 1243. April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause, be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

May 6, 1903.

TUESDAY, *May 12th, A. D.* 1903.

ANDREW C. KEELY, Trustee, and RICHARD K. PAYNTER, Appellants,
vs.
JOSEPH H. MOORE, EDWARD J. STELLWAGEN and THOMAS M. Gale, Trading as Thomas J. Fisher and Company; Mary Cecelia Thomson and Georgiana Hawkes Thomson. } No. 1243.

On motion of Mr. Leo Simmons of counsel for the appellants, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Andrew C. Keely, trustee, and Richard K. Paynter, appellants and Joseph H. Moore, Edward J. Stellwagen and Thomas M. Gale, trading as Thomas J. Fisher and Company, Mary Cecelia Thomson and Georgiana Hawkes Thomson, appellees, a manifest error hath happened, to the great damage of the said

appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of May, in the year of our Lord one thousand nine hundred and three.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Andrew C. Keeley, trustee, and Richard K. Paynter, as principals, and Victor Anderson, as surety, are held and firmly bound unto Joseph H. Moore, Edward J. Stellwagen and Thomas M. Gale, trading as Thos. J. Fisher and Company, Mary Cecelia Thomson and Georgiana Hawkes Thomson in the full and just sum of three hundred dollars ($300.00) to be paid to the said Moore, Stellwagen, Gale, Mary C. Thomson & Georgiana H. Thomson certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of May, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between Andrew C. Keeley, trustee and Richard K. Paynter *vs.* Joseph H. Moore, Edward J. Stellwagen and Thomas M. Gale, trading as Thos. J. Fisher and Company, Mary Cecelia Thomson and Georgiana Hawkes Thomson a judgment was rendered against the said Andrew C. Keeley, trustee, and Richard K. Paynter and the said Andrew C. Keeley, trustee, and Richard K. Paynter having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph H. Moore, Edward J. Stellwagen & Thomas M. Gale, trading as Thos. J. Fisher & Co., Mary Cecelia Thomson & Georgiana Hawkes Thomson citing and admonishing them to be and appear

at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Andrew C. Keeley, trustee and Richard K. Paynter shall prosecute said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ANDREW C. KEELEY, *Trustee*, [SEAL.]
By LEO SIMMONS, *Att'y.* [SEAL.]
RICHARD K. PAYNTER. [SEAL.]
VICTOR ANDERSON. [SEAL.]

Sealed and delivered in the presence of—

LEO SIMMONS
For Keely and Wit. as to Signature of Paynter and Anderson.

Approved by—

R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

O. K. as to surety

LAMBERT & BAKER.

[Endorsed:] No. 1243. Andrew C. Keeley, trustee, *et al.*, vs. Joseph H. Moore, *et al.* Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia. Filed May 15, 1903. Robert Willett clerk.

UNITED STATES OF AMERICA, ss:

To Joseph H. Moore, Edward J. Stellwagen and Thomas M. Gale, trading as Thomas J. Fisher and Company; Mary Cecelia Thomson and Georgiana Hawkes Thomson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Andrew C. Keely, trustee and Richard K. Paynter are plaintiffs in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of

Appeals of the District of Columbia, this 15th day of May, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted
LAMBERT & BAKER,
For Thomson Def'ts.
HAMILTON & COLBERT,
For Stellwagen & Gale & Moore.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 22, 1903. Robert Willett, clerk.

In the Court of Appeals of the District of Columbia.

ANDREW C. KEELY ET AL.
vs.
JOSEPH H. MOORE ET AL. } No. 1243.

In preparing the record for the Supreme Court of the United States, on writ of error in this case, the clerk will include the,
Transcript of the record from the supreme court of the District of Columbia, as printed,
Memorandum of argument,
The opinion of the court,
Judgment,
Writ of error,
Bond on writ of error, and
Citation.

LEO SIMMONS,
For Pl'ffs in Error.

(Endorsed:) No. 1243. Andrew C. Keely, *et al.*, appellants, *vs.* Joseph H. Moore, *et al.* Directions for preparation of transcript. Court of Appeals, District of Columbia. Filed May 22, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered 1 to 142, inclusive, contain a true copy of the transcript of record and proceedings in said Court of Appeals, as designated by counsel for the appellants in the case of Andrew C. Keely, trustee and Richard K. Paynter, appellants, *vs.* Joseph H.

Moore, Edward J. Stellwagen and Thomas M. Gale, trading as Thomas J. Fisher and Company; Mary Cecelia Thomson, and Georgiana Hawkes Thomson, No. 1243, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 8th day of June A. D. 1903.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,969. District of Columbia Court of Appeals. Term No. 55. Andrew C. Keely, trustee, and Richard K. Paynter, plaintiffs in error, *vs.* Joseph H. Moore, Edward J. Stellwagen and Thomas M. Gale, trading as Thomas J. Fisher and Company, *et al.* Filed June 9, 1903. File No. 18,969.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELEY, TRUSTEE, AND
RICHARD K. PAYNTER

vs.

JOSEPH H. MOORE., Et Al.

BRIEF FOR PLAINTIFFS IN ERROR.

HUGH T. TAGGART,
C. C. COLE, AND
LEO SIMMONS,
Attorneys for Plaintiffs in Error.

MILLER, LAW PRINTER, 615 E STREET N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELEY, TRUSTEE, AND RICHARD K. PAYNTER

vs.

JOSEPH H. MOORE, ET AL.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

The plaintiffs in error, who were plaintiffs in the trial court, filed their declaration in the Supreme Court of the District of Columbia, on September 7, 1899, against Joseph H. Moore and the members of the firm of Thomas J. Fisher & Co., to recover an undivided 91-100 part of lot 23, in Davidson's subdivision of square 166, in Washington City, claiming an estate in fee in the premises.

The defendants entered pleas of not guilty and issue was joined upon them (Rec., pp. 1-3.)

Mary Cecelia Thomson and Georgianna Hawkes Thomson, defendants in error by petition, prayed for

leave to intervene and be made parties defendants, averring that they were the owners of the property and that the defendants, Moore and Thomas J. Fisher & Co., were real estate agents, managing the property for them, the said petitioners were made parties defendants (Rec., pp. 62-63.)

The trial resulted in a verdict for the defendants; a motion of the plaintiffs for a new trial was overruled and judgment was entered upon the verdict.

On appeal to the Court of Appeals the judgment below was affirmed, from which this writ of error is prosecuted.

There were twenty-three assignments of error in the court below, based upon the exceptions noted in the record and were pressed before that court, yet in its opinion only three appears to have been considered. (Opinion, Rec., 133.)

The exceptions based upon the answer to the final interrogarory of witness Cooksey and on the motion for new trial on which error was assigned in the court below are abandoned.

Those of said exceptions upon which error is assigned will be numbered in consecutive order, as a matter of convenience, in this statement of the case.

It appears from the record that said plaintiffs claimed title under the heirs at law of William Thomson, Jr., who died in January of 1887, in Southampton, England (one of the plaintiffs is trustee for said heirs and the other claims a small interest in his own right (Rec., p. 34) and that said defendants claimed title by devise in an alleged last will and testament of said William Thomson, purporting to be executed in duplicate in England in February, 1886.

At the trial the plaintiffs gave in evidence, on their part, a stipulation of counsel for the parties, by which it was admitted that William Thomson, Jr., died in 1887, seized of said lot; that he was born in and continued a citizen of the United States; that he left no issue or decendents, and that the plaintiffs had acquired and held the title of the heirs (American citizens) of said Thomson to the extent of 91·100 part of said lot; and it being admitted that the defendants were in possession of said lot, claiming as life tenants under an alleged will, the plaintiffs rested (Rec., pp. 5–6).

Thereupon the defendants, for the purpose of establishing said will, read in evidence depositions of sundry witnesses taken in England under a commission, viz, those of Walter Randall Lomer and Richard Roope Linthorne, as to the preparation by said Lomer, and attestation by both of them of said alleged last will; and to the same being on file in the Probate Division of the High Court of Justice, in England. And that of Septimus Cooksey, as to the signature of John H. Cooksey, vice-consul of the United States at said Southampton, to an *official certificate* on the margin of said paper, under the *seal* of the consulate. Which official certificate was claimed by defendants to be part of the attestation of said will and to constitute the said John H. Cooksey one of the subscribing witnesses thereto; and of Robert Albion Pritchard and Walter Maxwell Lyte, as to said will and testament being on file in said High Court of Justice and as to its having been probated there; and those of William Gee Parker and John Dalton Venn, as to the photographing said certificate of said Cooksey.

Mr. Lomer testified, in substance, that he was a lawyer at Southampton, England, on February 24, 1886; that

for several years prior to that day he knew William Thomson by repute and by sight, but only made his personal acquaintance in that month ; that he and Linthorne, his articled clerk, witnessed a last will of said Thomson, at the request of said Thomson and in his presence and in the presence of each other ; that the will was in the handwriting of Edward Bone, another articled clerk then employed, at his, Lomer's, office, and was prepared by him, said Lomer, under instructions received from Thomson ; and that the "certified copy" accompanying the commision is a true copy of said will (Rec. pp. 7-9).

In reply to cross-interrogatories, the witness testified in substance : That Thomson first called at his office on February 15, 1886, when instructions were given in regard to the will ; that the will was signed in his office ; that he prepared two papers, viz, *the will in duplicate*, which were signed and witnessed by himself and Linthorne at the same time, viz, on February 24, 1886 ; that one duplicate was sent to the Probate Court at New York; that he did not know Thomson had been in an insane asylum in December, 1885, and so confined for a considerable time (Rec. 9-10). The witness also testified that after the papers were signed said Thomson—

> "Took the will in duplicate away with him, first giving me a receipt for them, and he then stated he *would attend before the consul general in London, and obtain the requisite certificate, and not trouble the vice-consul, Mr. Cooksey, in the matter;* but the next day he called and stated that he did not know when he would be in London again, and therefore had seen Mr. Cooksey and arranged with him to get the certificate, and he handed me his will in duplicate to have the form of certificate

engrossed thereon, which was then done and his will in duplicate returned to him" (Rec. pp. 10-11).

He further testified that he represented professionally, in England, the Misses Thomson, defendants to this suit (Rec. p. 11).

Mr. Linthorne's testimony was similiar in point and substance to that of Mr. Lomer, except that he stated he first met Thomson on February 24, 1886 (Rec. pp. 12-15).

It is apparent from the depositions of Lomer and Linthorne that neither copy of the alleged will was before them or the commissioner at the time they testified. Neither copy was produced at the trial, and no reason was given or shown for such non-production.

An alleged copy of the will given in evidence by defendants will be found on pages 24 and 25 of the record.

The copy so offered in evidence (Rec. p. 24) is not identified in any way by said witnesses, other than by the fact of its date, namely, February 24th, 1886. Later on it will appear from the other witnesses, who testified by deposition aforesaid, that it is not the same paper.

The paper referred to by said witnesses, Lomer and Linthorne, if executed by said William Thomson, was executed in duplicate. No excuse whatever is given for not producing either of said duplicates. From the evidence it will appear that the alleged duplicate, that was filed in London was taken around to various places to photograph an alleged certificate, purporting to be on the margin of said paper. But on what margin or what part of the paper is not shown. Why the alleged certificate should be photographed and not the whole paper is hard to conceive. It cannot be on account of the length of

same, if the copy offered in evidence was taken from it.

It appears from Lomer's testimony that when the paper was delivered by him to said Thomson, it was delivered as a complete instrument and attested by two witnesses only, viz. Lomer and Linthorne. And from the "Exhibit" certified by "A Musgrave, Register," which gives a copy of the certificate of John H. Cooksey, it appears that said certificate formed no part of the probate (Rec., pp. 23–24).

Septimus Cooksey testified in response to the interrogatories that he was a son of John H. Cooksey, formerly vice-consul of the United States at Southampton; that said Cooksey was such vice-consul on February 24, 1886; that deponent had frequently seen his father write and was familiar with his handwriting; that on May 16, 1900, deponent attended the Principal Registry of the Probate Division of the High Court of Justice; that the will of Thomson, dated February 24, 1886, was shown to him; that he examined particularly the certificate written in the margin of the second and last page and that the signature to said certificate was in the handwriting of his father.

It will be seen also that the copy offered in evidence is not identified by this witness. He testified about a will being on record in the London Court, and was asked to look at photograph marked "J. D. V. 1" and appended to the commission, and state who wrote and signed said statement set out on the photograph. The photograph referred to as "J. D. V. 1" is not in evidence. The only certificate in evidence which bears any resemblance to the one referred to by the witness is marked "J. D. V. 3" (Rec., p. 23).

First Assignment of Errors.

The interrogatories propounded to the witness, Pritchard, were each objected to by plaintiffs, before the commission was issued, as incompetent and irrelevant; the objections were renewed to each of them and objection made to the answers to each of them at the trial. The overruling of said objections and the permitting of the reading of said questions and answers in evidence, although severally excepted to, may be considered together (Rec. p. 18).

Mr. Pritchard testified, in substance, that he was a barrister at law and one of the registers of the Probate Division of the High Court of Justice; that his duties were "to examine, certify, *and sign wills*," and for that reason he had knowledge of the records of his office and of the original papers therein; that there was in said division a paper purporting to be the last will of William Thomson; that it had been probated in said division; that there is on the last page of the original will a certificate—

> "a true copy of which is photographed and annexed to the declaration of the notarial certificate of Mr. Venn,"

which is now produced to him; that there was no other certificate on the said will but the attestation clause signed by Lomer and Linthorne (Rec. 18–19); that the original of the photograph of certificate of John Henry Cooksey, "J. D. V. 1, *not J. D. V. 3*, as stated in the interrogatory," appears written on the second, which is the last, page of said will, and that the paper attached *to the interrogatories marked J. D. V. 2, purporting* to be a certi-

fied copy of William Thomson's last will and testament, had been compared by deponent with the original on January 15, 1901, and is correct in every particular (Rec., p. 19).

No cross-interrogatories were propounded to this witness. It will be noticed that the witness Cooksey says this original was shown to him May 16th, 1900, while this witness saw it near a year later, while Mr. Venn says the photograph was made April 23, 1900, (Rec., p. 20) and Mr. Gee Parker, who photographed it, says likewise.

The witness Prichard is the only witness that purports to give the contents of the certificate in his answer. It will be seen that said paper is designated by him also as "J. D. V. 1" and that the paper attached to the interrogatories marked "J. D. V. 2," purporting to be a certified copy of the will, etc. The witness states distinctly that he does not refer to paper marked "J. D. V. 3," the one in evidence.

Second Assignment.

The interrogatories to be propounded to Mr. Parker were separately objected to by plaintiffs, before the commission was issued, as incompetent, irrelevant and immaterial; the objections were renewed to each of them at the trial and objection then made to the answers to each of them, and to the overruling of said objections in each instance and the permitting of the reading of said questions and answers in evidence the plaintiffs excepted (Rec., pp. 19–20. These exceptions may be considered together and treated as one exception.

Witness Parker testified that he is a photographer; that he was called to make a photograph of the paper purporting to be a certificate, on Thomson's will; that the

will was brought to the place where the examination of the witness is being taken, 288 High Holborn, in the County of London, England, by gentlemen from the Probate Registry of the High Court of Justice, Somerset House, Strand County, of London; that witness personally made the photograph of said certificate *while the will and certificate was in his studio; the photograph was made April 23, 1900; that the photograph J. D. V. 1 is a facsimile of the certificate* as it appears on the original will; the original photograph is the same as is annexed to the notorial certificate of Mr. Venn, now produced before him by the commissioner, *marked J. D. V. 1;* and that the negative of the photograph is in witness' possession (Rec., 20-21). No cross-interrogatories were propounded to this witness.

This witness, "Parker" refers to a paper marked "J. D. V. 1;" not No. 3 as in the record. It will be noticed also, that this witness testifies that the paper purporting to be the will of Thomson was taken to his place of business. If taken out of the Registery at London, why could it not have been sent to this country? No excuse whatever is given for failure to do so. We again call the Court's attention to the unique practice of photographing one part of the paper for the purpose of evidence.

Third Assignment.

The interrogatories to be propounded to Mr. Venn were separately objected to by plaintiffs, before the commission was issued, as immaterial, irrelevant and incompetent; the objections were renewed to each of them at the trial, and objection then made to the answers to each of them, and to the overruling of said objections in each instance and the permitting of the reading of said questions and

answers in evidence the plaintiffs excepted (Rec., p. 21). These exceptions may also be considered together and treated as one exception.

Mr. Venn testified in substance that he was a notary public in London; was present and saw the certificate in the margin of William Thomson's will photographed April 23, 1900, and that the photograph J. D. V. 1, annexed to the interrogatories is the photograph so taken in his presence (Rec., pp. 21-22). In answer to the general interrogatory, he said:

> "I refer to my notarial certificate marked 'Exhibit A,' which is annexed to these interrogatories, which was granted by me on the 23d day of April, 1900, under my notarial seal and signature, which sets out all I know in connection with the photograph, and the will of said William Thomson; and also the certificate in the margin of the said will; and I confirm same in every particular."

No cross-interrogatories were propounded to this witness.

Again "J. D. V. 1" is referred to by the witness. And also Exhibit A.

What "J. D. V. 1" or Exhibit A contained is not shown by the witnesses' testimony. Neither paper being in evidence.

Fourth Assignment.

The interrogatories propounded to the witness Lyte were each objected to before the commission was issued, as irrelevent and incompetent, the objections were renewed at the trial and objection then made to the answers to each of them, and to the overruling of said objections in each instance and the permitting of the reading of said

questions and answers in evidence the plantiffs excepted (Rec., p. 22). These exceptions may be also considered together and treated as one exception.

Mr. Lyte testified that he was a "curl servant" employed as a clerk in the probate registry, that the duties of said office were the proving, registering, and custody of wills and granting letters of administration; that in said office is a paper probated as the last will and testament of William Thomson; that witness, "acting on instructions from the record keeper of the probate registry," on April 23, 1900, took said will to the studio of Mr. Parker, photographer; that he has looked at the photograph "J. D. V. 1" and that said photograph is "word for word" of the original certificate on said will (Rec., pp. 22-23).

No cross-interrogatories were propounded to this witness.

Again "J. D. V. 1" is referred to by the witness and what it contains is not in evidence.

Fifth Assignment.

The defendants then read in evidence, over plaintiff's objection, a paper marked "J. D. V. 3" (Rec., p. 23), entitled:

> "'Exhibit from the Principal Registry of the Probate, Divorce, and Admiralty Division of the High Court of Justice.' The following is a copy of a certificate written on the second page of the original will of William Thomson, deceased, proved in this registry the 25th day of January, 1887, but which forms no part of the probate thereof."

Then follows a copy of a certificate signed "John H. Cooksey" and a certificate of "A. Musgrave, Register," that the copy had been compared with the original and was a true copy thereof (Rec., pp. 23-24).

Nothing is said about Mr. Musgrave's authority to certify this paper and whether he was a Registrar of Births and Deaths, Suicide, etc., or Registrar of Wills does not appear. Besides the certificate is wholly incompetent if he were a Register of Wills.

By Sec. 905 R. S. U. S.

In order to admit any foreign record the Register must certify to the transcript, then his authority must be certified to by the Judge of his Court, and then the Register must again certify that the Judge is such officer.

Sixth Assignment.

The defendants then read in evidence "a paper purporting to be a copy of the last will and testament of William Thomson, Jr." (Rec., pp. 24–26).

It will be seen by the record that this paper is in no way identified as the paper referred to by any of the witnesses and whether it is the paper or not, it is impossible to know from the evidence that was before the court and contained in the record in this case, and further, that the title was left in William Thomson, Jr., while the paper purports to be William Thomson.

To the introduction and reading of this paper in evidence the plaintiffs objected for reasons stated, and to the overruling of the objection the plaintiffs excepted (Rec., p. 26).

The record states that—

"the defendants offered no further or other evidence in relation to said alleged will or the execution thereof, and thereupon announced their case closed."

It will be seen by the objections to the copy of the alleged will (Rec., p. 39) that they are pointed to the absolute want of evidence to support the admissibility of this paper.

PLAINTIFFS' EVIDENCE IN REBUTTAL IN RELATION TO SANITY.

In rebuttal of the defendants' evidence as to the sanity of said William Thomson and his competency to make such will, the plaintiffs read the depositions of Anne Lowman and Fred E. Hiscock.

Witness Anne Lowman testified in substance as follows: That she lived in the County of Southampton, England; that she knew William Thomson; that she was employed by him as housekeeper from 1882 to March, 1886; was in his employ in December, 1885; that he was in that month taken to the Laverstock House Asylum, because he was insane; that she thought he was insane because he stuffed paper and straw inside of his clothes and asked deponent and her mother, who was staying there to protect her, to set him on fire; that he tried several times to jump out of the windows, and all the windows had to be shut up and barred and secured; that he threatened deponent's life and talked of all sorts of nonsense; that he wrote letters to several persons without meaning, and that in order to quiet him deponent on several occasions made up a fur rug and put it in his bed and told him it was a baby; that he mixed food and drink, ate with his hands and behaved generally like a

madman; that said Thomson remained in said asylum from about December 16, 1885, to February 1, 1886; that she remained in his service until some time in March, 1886 (Rec., pp. 26–27). The alleged will bears date February 24th, 1886.

Seventh Assignment.

Being asked when and why she left him, she answered:

> "I left him some time in March, 1886, because Dr. Scott, his medical man, said it was not safe for me to stay there."

On objection of the defendants the words of the answer, "Dr. Scott, his medical man, said," were stricken therefrom by the court, and plaintiffs excepted (Rec., pp. 27-28).

Eighth Assignment.

The deponent further testified that while Mr. Thomson was at home she saw him daily and several times a day; that she waited on him; and in answer to interrogatory 17, the witness said:

> "Mr. Thomson went away on a holiday soon after he returned from the asylum, and in the interval I saw very little of him, as my mother would not let me go near him."

On objection by defendants, the portion of witness' answer "as my mother would not let me go near him" was stricken out and plaintiffs excepted (Rec., p. 28).

> "That she saw very little of him, but from what she did see he was just as insane as before he went to the asylum, if not worse; that she did not know

by whom the person was sent who succeeded her as housekeeper, unless it was by Mr. Cunningham, who seemed to be looking after Mr. Thomson's affairs; that Mr. Thomson was more easily persuaded to act or *do things after his return from the asylum than before he went, and could have been cheated and taken advantage of by any person after his return;* that Mr. Cunningham was not much at Mr. Thomson's until after his return from the asylum; after that he spent most of the day there, sleeping elsewhere at night" (Rec., p. 29).

Witness Hiscock testified that he was employed as a clerk in the United States consulate for about six years, and was so employed in 1885 and 1886; that Mr. Thomson was taken to Laverstock in December, 1885; that he was very violent, insane, and was taken there for treatment; that he tried to *break up his furniture and spoke of things that were impossible to occur; that he returned from the asylum with two* men as guards; that his mind was not in as good condition when he returned as it was before; he would ask the same questions over and over again, and changed his ideas in all of his transactions within the first month after his return; that he changed his will and did not seem to be in the same condition of health, mentally or physically; thinks Mr. Thomson was easily influenced after his return from the asylum; Mrs. Lowman, then Anne Barter, left Thomson's employ in March, about one month after the date of the will, because she did not like to stop in the house with him.

Notwithstanding the evidence of these two witnesses, employees of Thomson, to the contrary, the court by the 7th Prayer of the defendants (Rec., pp. 57 and 58) and the charge (Rec., p. 66) told the jury that there was no

proof of insanity of the testator at the date of the making of the will.

Ninth Assignment.

The following question was here propounded to witness (Int., 34, Rec., pp. 30-31):

> "Who had charge of Mr. Thomson's affairs after he was sick?"

To which the witness replied:

> "I telegraphed the old lady Thomson, against Mr. Thomson wishes, (he?) saying that the wolves would be here in time."

To this answer the defendants objected and it was stricken out by the court, to which ruling the plaintiffs excepted (Rec., pp. 30-31.)

The plaintiffs then produced as a witness William A. P. Lane, an English lawyer, and examined him touching the English law on the subject of wills and the admission of insane persons into asylums.

Witness Lane testified in substance that under I Vict., Ch. 26, Sec., 9, only two witnesses were required to a will of real estate in England. The witness identified a volumn of British statutes, from which he read said section.

The section, which appears in the record, page 31,* provides—

> "that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator or by some other

> person in his presence and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The witness then testified in substance that the English statutes governed commitments to asylums (Rec., pp. 31–32) ; that there were two kinds of lunatic asylums in England, public and private asylums, both of which must be licensed ; the commissioners in lunacy issued licenses to private asylums and the county authorities to public asylums ; and that the commissioners in lunacy are appointed by the government and their jurisdiction extends throughout England (Rec., p. 32).

Tenth Assignment.

The following question was then propounded to the witness :

> " Now, what are the conditions of entrance of a patient—the reception of a patient—in an asylum " (Rec., p. 32) ?

The defendants objected to the question if the conditions were statutory, and further on the ground that the evidence was incompetent and that it was immaterial how the man was sent there.

A revised edition of the British statutes was produced containing what plaintiffs proposed to show by the witness was the law on the subject,, and to follow this up with proof that Cunningham had given one of the certificates required by the statute, as bearing upon the ques-

tion of undue influence by the latter, upon which the court excluded the question, sustaining the objection, and refusing to permit the witness to testify or the statute to be considered, and the plaintiffs excepted (Rec., pp. 33–34–35).

Dr. J. H. Manning, examined as a witness for plaintiffs, testified by deposition in substance :

That he had been a medical practioner for forty years and was the medical officer and licensee of Laverstock House, a private asylum near Salsbury, England ; that he knew William Thomson ; that he first heard of him through Dr. Scott, medical man in Southampton, who wrote witness, asking him if he could receive Thomson for treatment (Rec., p. 36), first saw said Thomson on December 15, 1885, when he was committed to witness' care ; witness' authority to receive him was an order from his (Thomson) cousin, Mr. Cunningham, supported by two medical certificates, one of Professor Aitken and one of Dr. Scott, copies of which are hereto annexed ; *that Thomson, when received, was suffering from Bright's disease, and was anæmic and feeble ; he was excited ; believed he was in New York and that several strangers were his friends, and his conversation was rambling and incoherent ; that he, witness, was of the opinion that the mania was the result of weakness, following disease of the kidneys and old age, and was not necessarily transmitted ; he had no hallucinations, but suffered from delusions ;* identifies three letters, one of December 15, 1885 ; one of December 16, 1885, and one of January 12, 1886, as having been written by him, witness, while Mr. Thomson was under his care, and says that the note referred to in one of them (Rec., 39) was written by Mr. Thomson, who handed it

to him to forward ; that Mr. Cunningham and Dr. Scott called to see Mr. Thomson once ; that with the consent of two justices a patient may be discharged on probation, under the act of Parliament ; under it Mr. Thomson was, on February 1, 1886, granted leave of absence, and on that day left with a medical man and an attendant (Rec., pp. 36-37) ; that, in the opinion of Dr. Scott and witness, said Thomson was so much better as to entitle him to be released on probation ; his delusions and incoherentness had quite disappeared ; Mr. Thomson was, in witness' opinion, quite capable of attending to ordinary business, *but it would have been unwise for him to undertake any extraordinary business ;* Mr. Thomson was finally discharged, as recovered, on June 26, 1886, when his probation expired (Rec., p. 37).

The plaintiffs offered in evidence the three letters referred to by Dr. Manning, but on objection by the defendants they were excluded (Rec., pp 39–40).

The plaintiffs then offered in evidence as tending to prove the insanity of the alleged testator and undue influence on the part of James E. Cunningham, one of the executors, in procuring the execution of the will, certain papers referred to on page 34 of the record and set forth in full on pages 40–43 of the record, the excution of which was, under the act, a prerequiste to the admission of said Thomson to said asylum ; said papers being the application of said Cunningham, for such admission of said Thomson, accompained by his statement as to the age and condition of said Thomson, of whom he claimed to be a cousin, and two medical certificate,s one of Dr. Aitken and the other of Dr. Scott, as to said Thomson"s insanity, based on personal examination of said Thomsom

and inquiry, and which papers were stated by Dr. Manning to be his authority under the statute for receiving said Thomson at said asylum.

Eleventh Assignment.

To the introduction of these papers in evidence the defendants objected in each instance; the objection was sustained and plaintiffs in each instance excepted (Rec., pp. 40–42). These exceptions may by considered together and are given one number.

William Thomson Weir, Jr., was then examined as a witness for the plaintiffs, and testified in substance as to the insanity of said Thomson and other matters, as follows:

That he had known William Thomson and said Thomson's mother since his (witness) childhood; that Thomson's mother would tear paper up and put it away as money, and allow no one to touch it; William Thomson used to come to the house of witness' father; that witness went to live with said Thomson in Southampton in February, 1885, about two years before his death, and remained at said Thomson's house until January 10, 1886; that in October, 1885, witness noticed that he (Thomson) wanted to get out of bed and go in the street without putting on his clothes; that upon being put back to bed he would again try the same thing; *between October 1, 1885, and December 15, 1885, he would try to pick hot coals out of the fire with his bare hands; he would blow out a candle and suck it, and if an attempt was made to take it from him he would get wild; he would sit up and get dressed, then would undress and get in bed and in a few moments arise and dress again and walk into the drawing room, bow and say "good evening," when there was no one there; would stuff his*

clothes full of paper and try to set them afire; he threw an ornament from the mantel through the dining-room window; had to have an attendant when he was taken out driving; upon going back to the house he would refuse to go in the house, had to drive him around the block several times before he would go in; when they undertook to force him to do anything he would get wild and pitch around and tear things; when his meals were brought they would have to put the food in his mouth; used to get him to sign checks to carry the house along; the president of the bank and Mr. Cunningham knew of the situation (Rec., p. 43); Mr. Thomson did not know what he was signing; checks amounted to about eight hundred dollars; money was expended for clerk hire and household expenses; witness left a full statement for Mr. Cunningham (Rec., p. 44)); *after Mr. Thomson became violent he was in charge of two men, one for the night and one for the day; he would often raise an umbrella and walk through the house when he was dressed and when he had his nightgown on; would go out in his underwear; he would go out in cold weather without being dressed;* Mr. Cunningham was at the house when Mr. Thomson was taken to the asylum; he was taken there at Mr. Cunningham's suggestion; Mr. Cunningham took charge of all Mr. Thomson's affairs when latter was taken to the asylum. The witness further stated that Mr. Thomson spoke a great deal about his (witness) mother, and in witness' opinion liked her very much; Mr. Cunningham invited witness to visit him, and Mr. Thomson, after Cunningham had gone, asked witness not to go; he said he did not want witness to mingle with those people (Rec., p. 44); that Mr Cunningham told witness that there was about thirty thousand dollars in the hands of Samuel

G. Thomson; he said the picture mentioned in the will and devised to be sold and the preceeds divided between Cunningham and the defendants was of the value of $10,000 (Rec., p. 45).

The witness further testified that the household effects of Mr. Thomson consisted of expensive furniture and lots of solid silverware; that witness made an inventory of them, of which he had a copy with him. He was then asked:

> "From taking that inventory that you have there, what would you consider the property worth?"

The defendants objected to the question on the ground that it had not been shown that the witness was an expert as to the value of silverware. They also objected to testimony by the witness showing what Mr Thomson considered it to be worth (Rec., pp. 44–45); the court refused to permit the witness to answer the questions and plaintiffs excepted (Rec., p. 47).

Twelfth Assignment.

The witness Weir further testified that the seal of the consulate was kept at the consulate and not allowed to go out; that he (witness) was at the consulate for about one year and had seen what was done at the office; the vice-consul had no office. Thereupon the following question was propounded to the witness:

> "Now, state whether or not, under the general form and custom of the office, Mr. Cooksey certified the papers" [referring to certificates as to signatures], "stating that the party who acknowledged was present when he was not present?"

On objection by the defendants the court refused to permit the witness to answer the question and plaintiffs excepted (Rec., p. 47).

The witness further testified that Mr. Thomson had made a former will just before being taken sick; that in the latter part of 1885 witness had this will in his possession and sent it to his father in America, who was one of the executors named in it; that Mr. Thomson had told witness just before being taken ill that he had made such will, and that witness would find it among his papers if anything happened to him; that the will was afterward returned to Mr. Thomson in England; that witness had made search for the will; had inquired of Mr. Cunningham's relations in England and at the Probate Court in England, but could not find same.

Counsel for plaintiffs then called upon defendants for the production of this will, on whose behalf counsel replied they had no idea of producing same.

The witness further testified that the will was witnessed by two witnesses only, that it left all the property to witness and his two brothers; that witness was a companion to Mr. Thomson; he did everything for witness, and wanted to educate him at a French school; it was his intention to send witness to school when he (Thomson) was taken sick; almost every place Mr. Thomson went witness went; he wanted witness to take his name; witness was constantly associated with him, and never saw him use tobacco in any way; the witness and his brothers took nothing under the new will.

William Thomson Weir, Sr., was then examined on behalf of plaintiffs and testified, in substance that he had known William Thomson for twenty-five years; that he knew William Thomson's mother; she was insane; that

she was in witness' house for ten or twelve years; that witness' wife and mother took care of her; that the former will of said William Thomson was in his (Thomson's) handwriting, and was attested by two witnesses only; that he had seen and examined it, and that none of the devisees mentioned in the last will were mentioned in the former; *and that in said former will testator had made provision for bringing his remains to this country for burial in the family vault at Trenton, N. J., where the father, mother and brothers were buried* (*Rec., pp. 48-49.*)

Plaintiffs then gave in evidence in futher rebuttal certain documents from the Treasury Department, being certain accounts rendered between July, 1885, and June, 1886, showing that charges had been made in the consul's office at Southampton for certificates to signatures of sundry persons and included in the receipts of said office.

And thereupon, for the only purpose of showing that the signature to the said certificate of the said John H. Cooksey was not intended to be that of a subscribing witness to the said alleged will, and for the further purpose of showing that the signature of testator did not oppear on the first page of the instrument on file in the Probate Divorce, and Admiralty Division of said High Court of Justice, purporting to be the last will and testament of William Thomson, plaintiffs gave in evidence a certified copy, made in 1887, of said instrument (Rec., p. 49.)

A. B. Richardson, superintendent of the Government Hospital for the Insane, and a physician who had made a specialty of mental diseases, was then examined by plaintiffs in rebuttal.

A hypothetical case stating the peculiarities of behavior of said Thomson, as disclosed by the testimony, and his

confinement in an insane asylum, was put to him and the witness was asked for an opinion based on such case as to the permanency of the mental disease of the subject, and in reply he answered that the symptoms stated had an element of dementia out of the ordinary character of acute mania, and that it would be impossible that there would not remain a certain amount of weakness of mind after the acute symptoms had subsided; that the greater the age at time of these attacks the more extreme the degree of feebleness after the attack (Rec., pp. 52-53). He was then asked for his opinion as to whether a person—

> "that had been so confined and shown the violent symptoms as described and indicated would be more readily influenced after such symptoms had subsided than he would while they were on him."

The defendants objected to any answer to the question, and the objection was sustained (Rec., p. 53).

The plaintiffs then announced their case in rebuttal closed.

The defendants then gave in evidence a deed from sundry heirs at law of William Thomson to the plaintiffs, conveying the real estate in controversy (Rec., p. 54) but for what purpose is not stated; they agreed that plaintiff had title (Rec., pp. 5 and 6).

Thirteenth, Fourteenth, Fifteenth, Sixteenth and Seventeenth Assignments.

The plaintiffs objected severally to the defendant's second, third, fourth, sixth, and seventh prayers; the objections were overruled and plaintiffs in each instance excepted (Rec., pp. 56-58).

The Court's attention is especially called to the 7th of these instructions, by which it will be seen that a part of the plaintiffs' evidence, after being admitted was taken from the consideration of the jury.

Eighteenth Assignment.

The court refused to grant the plaintiffs' fifth prayer, and in lieu thereof gave a prayer of that number, as set forth in the charge, by which said prayer as offered was modified, to which modification plaintiffs excepted (Rec., pp. 60-61).

Nineteenth and Twentieth Assignments.

The court refused to grant the plaintiffs' sixth aud eighth prayers, to which refusal the plaintiffs excepted in each instance.

ASSIGNMENTS OF ERROR.

1. The court erred in permitting the several questions aud answers thereto in the deposition of Robert Albion Prichard, a witness for defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 18–19).

2. The court erred in permitting the several questions and answers thereto, in the deposition of William Gee Parker, a witness for defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 20–21).

3. The court erred in permitting the several questions and answers thereto in the deposition of John Dalton Venn, a witness for the defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 21–22).

4. The court erred in permitting the several questions and answers thereto, in the deposition of Walter Maxwell Lyte, a witness for the defendants, to be read in evidence to the jury over plaintiffs' objection to each of them (Rec., pp. 22–23).

5. The court erred in admitting in evidence over plaintiffs' objection the paper marked "J. D. V. 3," purporting to be a copy of an official certificate of John H. Cooksey, vice-consul, United States of America (Rec., pp. 23–24).

6. The court erred in permitting the paper purporting to be a copy of the last will and testament of William Thomson to be read in evidence to the jury over plaintiffs' objection (Rec., pp. 24–25).

7. The court erred in excluding from the consideration of the jury so much of the answer of Annie Lowman, a witness for plaintiffs, to the 15th interrogatory propounded to her in the commission, as stated that her reason for leaving her employment as housekeeper in the service of said William Thomson, in March, 1886, (just after the execution of the will of said Thomson) was that Dr. Scott, said Thomson's medical man, had said that it was not safe for her to continue in such service (Rec., p. 28).

8. The court erred in excluding from the consideration of the jury so much of the answer of said Annie Lowman to the seventeenth interrogatory propounded to her, as stated that the mother of the witness would not let her go near said William Thomson (Rec., p. 28).

9. The court erred in excluding from the consideration of the jury the answer of Fred Hiscock, a witness for plaintiffs, to the thirty-fourth interrogatory propounded

to him in the commission (Rec., pp. 30-31).

10. The court erred in excluding from the jury the testimony proffered by plaintiffs, through William A. P. Lane, an English lawyer, as to the requirements of the English law in regard to the admission of insane persons to asylums, and in that connection further erred in excluding from the jury any testimony of said Lane as to said law being contained in the volume of the British statutes produced at the trial (Rec., pp. 31-35).

11. The court erred in excluding from the consideration of the jury the copy of the application of James E. Cunningham, devisee and executor named in said will, for the admission of said Thomson to said insane asylum, and in excluding from the jury the copies of the medical certificates of Dr. Aitken and Dr. Scott in support of the same (Rec., pp. 40-41).

12. The court erred in sustaining the objections of the defendants to the questions propounded to William Thomson Weir, Jr., a witness produced for the plaintiffs, as to whether, under the custom of the consul's office, John Henry Cooksey, vice-consul, in certifying papers certified that the parties acknowledging the same were present when they were not so present (Rec., pp. 40-42).

13. The court erred in granting defendants' second prayer over plaintiffs' objection (Rec., p. 56).

14. The court erred in granting defendants' third prayer over plaintiffs' objection (Rec., pp. 56-57).

15. The court erred in granting defendants' fourth prayer over plaintiffs' objection (Rec., pp. 56-57).

16. The court erred in granting defendants' sixth prayer over plaintiffs' objection (Rec., p. 57).

17. The court erred in granting defendants' seventh

prayer over plaintiffs' objection (Rec., pp. 57-58) by which the jury were told that there was no evidence of insanity of the said Thomson, given by certain witnesses of the plaintiff, at the date of the alleged will, when in fact two of such witnesses had distinctly testified that there were acts of insanity during the whole of the month in which said will is alleged to have been made.

18. The court erred in refusing to instruct the jury as requested in plaintiffs' fifth prayer; that in considering the question of William Thomson's mental capacity they should take into consideration said Thomson's age and the insanity of his mother and uncle, and the age at which the latter were affected; and that the witnesses to the will apparently were strangers to the testator, and were not capable of judging of his mental capacity as well as those who knew him, such as a friend or an intelligent servant who had known him for years, and in modifying said prayer by excluding said request therefrom, as shown by the prayer numbered five in the charge (Rec., pp. 60, 72-3).

19. The court erred in refusing to grant plaintiffs' sixth prayer (Rec., p. 61).

20. The court erred in refusing to grant plaintiffs' eighth prayer (Rec., p. 61).

ARGUMENT.

First Assignment of Error.

The first assignment of error is based upon the exceptions severally taken to the overruling of the objections made by plaintiffs, before the commission issued, to each of the interrogatories to be propounded to Robert Albion Pritchard and to his answers thereto (Rec., pp. 18-19).

It is apparent on the face of the questions, and the fact is emphasized by the answers of the witness, that his examination was addressed to the proving by him of records of an office, a "probate registry," in which he was employed; and that according to such records the last will and testament of aWilliam Thomson was a part thereof, and that the same had been admitted to probate and was of record there. The witness does not pretend to have any personal knowledge of the execution by said Thomson of such will, or of any fact or circumstance connected therewith, except what he learned from such records.

The question was asked and allowed whether, on the last page of said will, there was "any other certificate" (there being no previous mention of a certificate of any kind); and, if so, he was required to state the contents thereof; and his reply was admitted in evidence, that there was such certificate—

> "a true copy of which is photographed and annexed to the declaration and notarial certificate of Mr. Venn, which is now produced before me,"

and he then gives the language of the Cooksey alleged certificate, whether from memory or from the notorial certificate of Mr. Venn does not appear. The witness had the benefit of this "notarial certificate of Mr. Venn" in giving his testimony, and what he said about it and what he said it showed went to the jury, but the notarial certificate itself did not go to the jury, nor did the photograph "J. D. V. 1."

The length to which the witness went in this connection in assuming and stating facts bearing upon the execution of the will, a matter he knew nothing about, will

appear from the following extract from his testimony:

> "I have looked at a paper marked 'J. D. V. 1' (not J. D. V. 3, as is stated in this interrogatory) (Rec., p. 23) purporting to be a photograph of certificate of John Henry Cooksey, vice-consul of the United States; and I say that the original of such photograph appears written on the second, which is the last page of the original will executed by William Thomson, and bearing the date of February 25, 1886; and which will was made by William Thomson, and attested by Walter R. Lomer, solicitor, Southampton, Hampshire, England, and Richard Roope Linthorne, his articled clerk; and I say that the original does appear exactly as it is described on said Exhibit 'J. D. V. 1'" (Rec., pp. 18–19).

The Court below says the alleged photograph "J. D. V. 1." was admitted in evidence (Opinion, Rec., p. 136) but how the court reaches this conclusion when no such paper was admitted and is not in the record is hard to conceive.

Mr. Prichard further states (answer to final interrogatory):

> "That he knew that the original will of William Thomson has been duly proved in form of *law, and the probate of it would be accepted as evidence in all courts of justice in this country*" (Rec., p. 19).

The witness is requested in one of the interrogatories to look at a paper marked "J. D. V. 2," which it is stated "purports to be a certified copy of the last will and testament of William Thomson," and he is asked to state "what said paper is," and in reply he states that

he has looked at it, and then he adds, "and I say that the paper is what it purports to be, a certified copy of the last will and testament of William Thomson," but by whom certified or by what authority does not appear; he further says that he has compared the paper "J. D. V. 2" with the original will of said Thomson and that it is "correct, word for word," with it.

The paper as to which the witness so testifies, viz., "J. D. V. 2," was not in evidence before the jury. The record discloses that all the evidence on the part of the defendants is contained in it, and the paper in question "J. D. V. 2," nowhere appears in it. The Court of Appeals erroneously assumed that it was.

That the testimony of this witness was incompetent and inadmissible (except as to the mere fact that a paper purporting to be the last will of William Thomson was in the office with which he was connected) and tended greatly to prejudice the case of the plaintiffs before the jury, is obvious.

> "IT SHOULD APPEAR BEYOND DOUBT THAT ERROR IN ADMITTING INCOMPETENT AND IMMATERIAL EVIDENCE DID NOT AND COULD NOT HAVE PREJUDICED THE RIGHT OF THE PARTY OBJECTING."

says this Court in

> Boston and Albany R. R. *vs.* O'Reilly, 158 U. S., 334.

Under the law of the District at the time of the execution of the will (1886) and of the death of the testator (in 1887), the fact of probate and record in England was

immaterial. Even if a duly certified copy of such probate had been offered in evidence, and it had shown an instrument executed apparently so as to pass land in the District of Columbia, such certified copy would have been inadmissible.

This proposition is fully sustained by the case of Robinson *vs.* Pickrell, 109 U. S., 608.

This position is not affected by the Act of Congress of July 9, 1898 (25 Stat., 246).

Campbell *vs.* Porter, 162 U. S., 478.

The suit in the case at bar was instituted in 1899 and is not affected by the Code.

Hence, as said by the court in Robinson *vs.* Pickrell, p. 112, proof of a devise of land in the District in ejectment—

> "must be made by production of the will in court and evidence of its execution by the subscribing witnesses; *or if the will be lost or can not be produced, the proof must be made by secondary evidence of its execution and contents.*"

The testimony of the witness was competent to neither of these requisites, even if the papers referred to had been in evidence, and necessarily tended to confuse and mislead the jury to the prejudice of the rights of plaintiffs.

The photograph in regard to which the witness testified and which he calls "J. D. V. 1" is identified by him as annexed to the notarial certificate of Mr. Venn in regard thereto, and this notarial certificate appears to have been itself marked "Ex. A," but neither the photograph nor the notarial certificate was in evidence.

If both the photograph and the notarial certificate of Mr. Venn, and also the alleged copy of the will referred to as "J. D. V. 2" had been in evidence, even then, in the absence of proof that the original or counterparts of the alleged will could not be produced, the evidence of the witness as to the contents of a part of it or the whole of it would have been inadmissable.

The alleged will, with its attestations, constitutes a mere private writing, and is to be dealt with as such. The instrument itself should have been produced and its execution proved by the subscribing witnesses, of whom it is not pretended that Mr. Pritchard is one. If not produced, there should have been a satisfactory showing of inability to produce it before parol evidence of its contents, in whole or in part, could properly be admitted.

The proceedings of foreign depositories or judicatories with respect to it were immaterial, and such proceedings were not competent evidence.

Robinson *vs.* Pickrell, 109 U. S., 608, 612.

> "To introduce into a cause a copy of any paper, the truth of that copy must be established and satisfactory reasons for the non-production of the original must be shown."

Smith *vs.* Carrington, 4 Cr., 70.
Clifton *vs.* United States, 4 How., 242.

If the law of England interposed an impediment to the production of the original will the fact should have been proved.

> "No court is to be charged with knowledge of foreign laws; but they are well understood to be facts which must, like other facts, be proved before they can be received in a court of justice."

Hanley *vs.* Donohue, 116 U. S., 1, 4.

Second Assignment.

This assignment is based in like manner upon the overruling of plaintiffs' objections made before the commission issued to each of the interrogatories to be propounded to William Gee Parker, and to the overruling of plaintiffs' objections made to each of the answers of the witness to the same (Rec., pp. 19–20, brief).

The questions to and answers of the witness are addressed to proving that a will of William Thomson was brought to his studio and that he photographed a certificate appearing in the margin of same, and that the photograph "annexed to the notorial certificate of Mr. Venn" now produced to him by the commissioner and marked 'J. D. V. 1' is a fac-simile of the certificate." the photograph in regard to which the witness testified and which he calls "J. D. V. 1" is identified by him as attached to a notarial certificate of Mr. Venn, which is "J. D. V 1" and so marked, as stated by the witness, and neither the photograph nor the notarial certificate of Mr. Venn was in evidence. If the notarial certificate of Mr. Venn, "J. D. V. 1," and the photograph annexed thereto had been in evidence, in the absence of proof that the original will could not be produced, the evidence of the witness as to the alleged part of it or even as to the whole of it was inadmissible.

See the authorities cited in the discussion of the first assignment. The matter will be further considered under the sixth assignment of error in relation to the admissibility of the paper purporting to be a copy of the will.

Third Assignment.

This assignment is based in like manner upon the overruling of the plaintiffs' objections, made before the

commission issued to each of the interrogatories to be propounded to the witness John Dalton Venn and to the overruling of the plaintiffs' objections made to each of the answers of the witness to the same (Rec., p. 21).

The testimony of this witness relates to the photograph in regard to which the witness William Gee Parker testified, and he refers to his (the witness) "notorial certificate marked Exhibit A, which is annexed to these interrogatories," and which he says was granted by him on April 23, 1900, under his "notorial seal and signature," which he says sets out all that he knows—

> "in connection with the photograph and the will of the said William Thomson, and also the certificate in the margin of the said will and I confirm the same in every particular" (Rec., pp. 21-22).

As has already been stated, neither this notarial certificate nor the photograph "J. D. V. 1" was in evidence.

The whole deposition was irrelevant and incompetent and should have been excluded.

Fourth Assignment.

This assignment is based in like manner upon the overruling of plaintiffs' objections made before the commission issued to each of the interrogatories to be propounded to the witness Walter Maxwell Lyte, and to the overruling of the plaintiffs' objections made to each of the answers of the witness to the same (Rec., p. 22).

The witness, a clerk in the "probate registry," testified that he had in his office "a paper probated as the last will and testament of William Thomson;" that acting on instructions from "the record keeper of the probate registry," witness took the original will to the studio

of Parker, where a certificate in the margin was photographed by Parker (Rec., p. 22, 23). And he identifies the photograph "J. D. V. 1" as the photograph to which he refers, and it is evidently that "annexed to the notarial certificate of Mr. Venn" referred to by Parker (Rec., pp. 22, 23), and by Venn (Rec., pp. 21–22).

The court's attention is especially called to this witness' statement (Rec., p. 23).

The photograph referred to was not in evidence, nor was it properly admissible in evidence under the authorities cited under the first assigument and the whole deposition was clearly irrelevant and immaterial.

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Fifth Assignment.

The assignment is based upon the overruling of plaintiffs' objection to the admission in evidence of the paper "J. D. V. 3" certified by "A. Musgrave, register," purporting to be a "copy of a certificate written on the second page of the original will of William Thomson, deceased, proved in this registry" but "*which forms no part of the probate thereof*" (Rec., p. 23). This paper is in no way identified by any witness in the case.

If the paper had formed part of the "probate" of the will, the certificate of such probate would have been inadmissible under Robinson *vs.* Pickrell, *supra*, and

other authorities cited in the discussion of the first assignment, but, forming no part of the probate, what the registry shows is simply his volunteer statement, not under oath, as to the contents of a written paper and it should have been excluded in either view.

Sixth Assignment.

This assignment is based upon the overruling of plaintiffs' objection to the admission in evidence of a paper described in defendents' offer of the same in evidence as a—

> "paper purporting to be a copy of the will of William Thomson, late United States consul at Southampton, England " (Rec., p. 26).

No Proof of Contents of Either Duplicate.

"J. C. Hannew, register," certified that on the 16th of August, 1887, the copy was examined with the original will "deposited in this registry." (Rec., 26.)

What the place of deposit is and what authority Mr. Hannew had to make the certificate twelve years before this suit was filed, does not appear. This is immaterial, as the offer of defendants is of a "paper purporting to be a copy of the will" only, and does not extend in terms to Hannew's certificate; but whether the offer included the certificate or not, the paper was not admissable for any purpose.

The Court of Appeals (Rec., p. 136) speaks of a certified copy of the will as "J. D. V. 2"; but in fact there is no such exhibit in the record.

Furthermore, it appears from the answers of Lomer, a witness for defendants, to cross-interrogatories (Rec.. p. 10), and the answers of Linthorne, another witness for defend-

ants, to cross-interrogatories (Rec. p. 14), and who were the only witnesses on the part of defendants to the execution of the will, that the instrument was executed in duplicate and that both papers were given to Thomson. It was incumbent on defendants to produce both duplicates or account for their non-production.

The court below says the original will was probated in London and retained in the Registery of the court and was not available to be produced at the trial. There is no evidence of this fact in any part of the record and none was offered at the trial.

The original will was the best evidence, if it could be produced ; and the duplicate was the next best. The paper so admitted did not of itself alone prove the existence of such original will, or that it was a copy of such original, and Hannew's certificate, a mere volunteer statement, made twelve years before the beginning of the suit, was not evidence of either fact.

The giving of this paper in evidence is the only attempt made by the defendants to prove the contents of a will of said Thomson, and the paper so admitted is not referred to, connected with, or identified by any other testimony adduced on the part of the defendants, and was therefore inadmissable.

1 Thompson on Trials, Sec. 825.

The Court of Appeals. notwithstanding the fact that that this question was pressed vigorously, wholly ignored the same.

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> "But whether the document whose contents in controversy be one which a statue requires to be in writing; or whether it be a contract put in writing by consent of parties; or whether belonging to neither of these classes, it be one whose meaning it is important for the purposes of justice accurately to collect—the policy of the law, independent of other reasons, requires that its original, if practicable, should be produced."
>
> 1 Wh. Ev. (2d ed.), Sec. 60.

There is no excuse or reason shown for the non-production of one of the duplicate papers alleged to be the will of William Thomson. The duplicate or counterpart which the witness Lomer says was sent to New York for probate, could have been produced without difficulty. In fact it will be presumed to be in their possession, for by the civil code of procedure of New York, it is provided that at the expiration of one year after the date of probate, the will shall be delivered to the executor or the devisees therein.

Civil Code of New York, Sec. 2635.

And see in addition to the authorities cited in discussion under First Assignment the following—

Riggs *vs.* Taylor, 9 Wh., 483.
Simpson *vs.* Dall, 70 U. S., 460.
Wood *vs.* Cullen Co., 13 Minn., 396.
Owen *vs.* Hull, 9 Pet., 264.
Weathered *vs.* Baskerville, 11 How., 357.

And, as to the like necessity for the production also of the duplicate will, or of accounting for its non-production as a foundation for secondary evidence of its contents, see 1 Wh. Ev., 74, where it is said:

"When, however solemn instruments are executed in duplicates or triplicates, all must be accounted for, so it has been intimated, when each has been executed by all the parties. Each is primary in respect to the other, and hence comes the conclusion that no one can exclude the other, and that one should not be received in the absence of the other, unless such absence should by some proof, however faint, be explained.

"It is undoubtedly true that where two testamentary papers are executed at the same time with the formalities required by law, they must be taken together to constitute the will of the testator * * * and both constitute, when read together, the will of the testator, as if all the provisions of both were contained in one instrument."

Crossman *vs* Crossman, 95 N. Y., 149.

"The proponents of either duplicate can undoubtedly be required to produce the other, so that both may be before the court for inspection, that it may be seen whether they are precisely alike or whether there has been any revocation." Ibid., 150.

"If there be duplicate originals of a deed all must be accounted for before secondary evidence can be given of any one."

1 Taylor Ev., p. 366.

In the High Court of Parliament, Phipps *vs.* Anglesey, 7 Bro. P. C., 443, it was held:

First. Where two wills are of different date, the last should be taken.

Second. Two inconsistent wills, of same date are both void for want of certainty.

Third. Two wills of same date not inconsistant are to be taken together as the last will of the testator.

See L. R. A. Rep., 37, 568, Note B, and Flemming *vs.* Flemming, 63 N. C., 209.

See also—

29 A and E. E. of law, 292, and authorities there cited.

The Alleged Will is not Attested by Three Witnesses.

It may be added that even if the paper admitted in evidence had been duly proved as a copy of the last will and testament of William Thomson; yet if it was not attested by three witnesses, and was, therefore, insufficient to pass real estate in the District.

It is obvious from the face of the paper that as executed on February 24, 1886, there were but two subscribing witnesses to it, viz, Lomer and Linthorne. The attestation clause, purporting to be subscribed by them is full, formal and complete, and contemplated only two subscribers, as is conclusively shown by the word "both" appearing in it.

It is also evident from the fact that Lomer who, it is alleged, prepared the will, was an English lawyer, and from the fact that but two witnesses were required by the law of England (both to be present and to sign at the time of execution) to a valid will of personal or real estate. That more than two were not contemplated is further conclusively shown by the testimony of said Lomer and Linthorne.

Lomer testified, in response to cross-interrogatories, that he and Linthorne signed the will as witnesses on February 24, 1886 (Rec., p. 9); and (Rec., p. 11) that after the signing of the papers he took his will and—

> "duplicate away with him, first giving me a receipt for them, and he then stated that he would attend before the consul general in London and *obtain the requisite certificate* and not trouble his vice-consul (Mr. Cooksey) in the matter; but the next day he called and stated to me that he did not know when he would be in London again, and therefore had seen Mr. Cooksey and arranged with him to get the certificate, and he then handed me his will in duplicate to have the form of the certificate engrossed thereon, which was then done, and his will in duplicate returned to him."

From this it appears that it was the procurement of an official certificate, the doing of an official act, only supposed to be desirable in connection with the will, which was contemplated by Thomson and by Lomer, and not the procuring of an additional subscribing witness thereto, but intended by them as a separate and distinct act wholly independent of the attestation.

This is still further evident from the form of certificate which, it is alleged, was written on the margin by Lomer who also wrote the attestation clause, and which, if intended as an attestation, would have been prepared in the full and complete form of the attestation of himself and Linthorne; and from the fact that it was executed by Cooksey in his official character and that to it he appended the *seal* of the consulate.

As it was not, therefore, in the contemplation of either

the testator or of Cooksey that such act of the latter was to be that of a subscribing witness, the *animus attestandi* was lacking, and there was in the case no evidence from which a presumption to the contrary could be drawn; the evidence was, as has been shown, to another and different intent.

The certificate was admitted by the court on proof of Cooksey's signature, upon the theory, that from its mere presence in the margin of the will—(whether top or side) the jury might presume that he signed as a subscribing witness, in the actual presence of the testator; but by the nature of the certificate and the only other evidence in regard thereto, the theory upon which the court acted was absolutely unwarranted. And under such circumstances, and in the utter absence of any proof tending to show directly or by inference that the act was done in the character of a subscribing witness, the certificate should have been excluded.

Clarke *vs.* Turton, 11 Vesey, Jr., 240, is directly in point. In that case, which was a bill in equity to establish a will, Sir William Grant, the master of the rolls, said:

> "Another objection was taken to the execution of the will; that the third signature was that of the vice-consul, the will being executed abroad, and the attestation of some such public officer is considered necessary to the validity of the act; that the attestation in this *instance was a mere memorandum by the vice-consul to operate as a certificate, a separate act in his public character and seal with his official seal, and therefore, it could not be said he subscribed as a witness.*"

Speaking of the above authority (Rec., p. 139) the Court of Appeals says:

> "Nor did the master of the rolls himself express any opinion as to the merits of this objection."

What did he (the master of the rolls) mean, when he said:

> "That the attestation in this instance was a mere memorandum by the vice-consul to operate as a certificate, a separate act in his public character and sealed with his official seal, *and therefore it could not be said that he subscribed as a witness.*"

The case at bar is identical and if the party making the certificate could not have been considered a subscribing witness, it is hard to see how it can be said that the master of the rolls did not express an opinion.

NO FACT IS PROVEN IN THE CASE TO JUSTIFY A PRESUMPTION THAT COOKSEY ACTED IN THE CAPACITY OF A SUBSCRIBING WITNESS; OR THAT HE SIGNED THE ALLEGED CERTIFICATE IN THE PRESENCE OF THOMSON.

The Court of Appeals says in its opinion:

> "The only element of an attestation wanting is, that it does not appear to have been signed by the subscriber as a witness at the request of the testator."

But the court will see as will be urged later that such is not the case, that there is no evidence of either fact, viz., the subscribing as a witness and signing in the presence of the testator. The seal of the consul being placed on his certificate as in the case of Clark *vs.* Turpin, *supra*, clearly indicates that he did not intend to act as a sub-

scribing witness. In order to supply both of these requisites the jury had to first presume he signed as a witness, and draw the further presumption upon the first that he signed in the presence of Thomson, as is required by our law.

> "Facts can not be inferred because a party is unable to prove them," says this court in Fulkerson *vs.* Holmes, 117 U. S., 401, see 405.

Giving to Cooksey's act the import of that of a subscribing witness to the will, as before mentioned, necessitated an indulgence in two inferences:

First. That he was such witness.

Second. That he did what the law required of such a witness, namely, that he signed the certificate in the presence of Thomson, *which would not be required of him in* making an official certificate under the seal of the consulate as he did in this case.

The evidence discloses no fact upon which these inferences could be based.

A presumption as defined in works on evidence is—

> "an inference as to the existence of a fact, not actually known, arising from its usual connection with another which is known,"

and it must be based upon a fact and not upon an inference, or upon another presumption.

> "Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them; and must still more give way when in conflict with clear, distinct and convincing proof."

Fresh *vs.* Gilson *et al.*, 16 Pet., U. S., 327.

> " Wherever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed."

Starkie on Ev., 80.
United States *vs.* Ross, 92 U. S., 281.

The court below having improperly allowed the jury to draw a presumption from the mere fact of Cooksey's name appearing on the margin of the will, that he was a subscribing witness, they were then allowed to draw a further presumption upon this one, namely, that the signature of Cooksey was appended in the presence of the testator.

As to the requisites of a valid execution of a will and presumptions in relation thereto, the attention of the court is called to the following authorities:

Chase *vs.* Kittridge, 11 Allen, 49.

In this case Mr. Justice Gray, late of this court, after reviewing the authorities, both English and American, and among them Penels *vs.* Weyant, 2 Har., 501, on the question of presumption in determining whether or not the signature of the testator was appended to the will prior to the signing by the witnesses, said :

> " The Court of Queen's Bench in Roberts *vs.* Phillips, 4 El. & Bl., 450, held that the subscription of the witnesses need not be below the signature of the testator or the end of the will. And there is an early rule of Lord Chief Justice Trevor to the same effect. Peake *vs.* Ougly, Com. R., 197. But in each of those cases there was direct or circumstantial evidence that the names of the witnesses were signed after the testator's signature

> and in his presence. There is no intimation by the court that any presumption of valid execution would arise even after the death of the witnesses from subscription so placed, and Lord Campbell, who delivered the opinion of the court in Roberts *vs.* Phillips, afterwards concurred in the judgment of the House of Lords in Hindmarsh *vs.* Charlton, above cited."

The decree of the probate court was reversed, the court holding that the will could not be admitted to probate for want of proper execution.

In the case of Penel's Lessee *vs.* Weyant, 2d Har. (Del.), 506, the court said:

> "Now, by the law of Pennsylvania there was no necessity that the witnesses should subscribe the will in the presence of the testator, which our law makes necessary, nor is there any reasonable ground in this particular case to infer that the parties had any reference to the Delaware law at the execution."

And further (p. 507):

> "In the present case we see nothing which would justify the jury to find that these witnesses did sign in the *presence* of the testator and from which to infer a proper execution of the will."

Schouler on Wills, Sec. 348, foot of page 384:

> "*In no case will the presumption of compliance with the statutory formalities arise unless the will appears on its face to have been duly executed.*"

Jarman Wills, Sec. 86:

"*In no case will the presumption of compliance with the statutory requirements be made unless the will appears on its face to have been duly executed.*"

Boone *vs.* Lewis, 103 N. C., 40:

"*Where one signs his name on a will in the place where the subscribing witnesses usually sign, there is a presumption that he signed as subscribing witness, but the contrary may be shown.*"

In that case it was held that the third name was not that of a subscribing witness.

Peake *vs.* Jenkins, 80 Va., 293:

In this case the instrument was propounded as the will of J. and wholly written by H., being signed J. by H., and is attested by witness L. L. being dead, the instrument is probated on the testimony of H., as a subscribing witness. Held, the instrument was not attested persuant to the statute. H. did not subscribe as a witness and could not attest the will.

Monday *vs.* Monday, 15 N. J., Equity, 293·

"The attestation clause, with the signature of the witnesses, is prima facie evidence of the facts stated in it. It may be overcome by the witnesses themselves, or by other witnesses, or by facts and circumstances irreconcilable with it."

Hollenbeck *vs.* Fleming, 6 Hill, 304:

"The subscribing witness is one who was present when the instrument was executed, and who at the time subscribed his name to it as a witness of the execution. (Henry *vs.* Bishop, 2 Wend.,

575.) He need not be present at the moment of the execution. If he is called by the parties immediately afterward and told that it is the deed or agreement, and is requested by the parties to subscribe his name as a witness, that will be enough. The execution by the parties, and the subscribing by the witnesses, are then considered as part of the same transaction." (Citing authorities.) "But, although the witness was present at the execution, if he did not subscribe the instrument at the time, but did afterward without the request of the parties, he is not a good attesting witness."

In Goods of Sharman, 1 P. and D., 662.

In this case the court say :

> "*When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete; and if a third person afterward adds his name, the court will not come to the conclusion, without cogent evidence, that that third person signed as an attesting witness.*"

In the Goods of Wilson, 1 P. and D., 269 :

In this case, in speaking of a case where one witness signed at the bottom of a page after the word "witness," and the other names were found at the top of the next page under the following words, viz, "a cottage situated on George street in the parish of E., in the county of York," the court said :

> "A testamentary paper is not entitled to probate unless the court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature."

And in the case of Leroy, 3 Brad., N. Y., 227, where a person signed, intending to sign for another person, which person afterward signed himself, though there were two names, viz, father and son, appearing as witnesses to the will, the court refused probate, holding that the will had only one witness.

And in the Goods of Eyon, 3 L. R. P. and D. 92, the deceased executed his will in the presence of the witnesses, one of whom also made a mark in the attestation of the signature of the deceased; the second witness then wrote the names of the deceased and the witnesses opposite their respective marks, and also the word "witness," but he did not sign his own name. Held, that he did not by any word he wrote attest the signature of the deceased, and that the execution was invalid.

See, also—

Hindmarsh *vs.* Carleton, 8 House of Lords, 160.

In the case of Patterson *vs.* Ransome, 55 Ind., 402, the court said:

> "The witnesses are regarded in the law as persons thrown around the testator in order that no fraud may be practiced upon him in execution of the will, and to judge of his capacity. By our law, as we have seen, witnesses are required to attest and subscribe the will. It is their province to judge the mental soundness of the testator, and they are required in order that no fraud be practiced upon him; and this statute contemplates that both shall witness and attest at the same time as one and the same transaction. Separate as these transactions were, both in time and place, each of the witnesses knew nothing of what transpired at the time of the other; therefore the will was not properly executed."

McDonald *vs.* Needham, 61 Texas, 264.

In this case the court held that an officer taking an acknowledgment is not a subscribing witness.

See, also—

Chaffery *vs.* Baptist Mission, 10 Paige, 91.

Dunn *vs.* Dunn, 1 P. and D., 277:

In this case it appeared on the face of the will that the signatures of the witnesses were affixed to it (one of the signatures having the word "executor" before it) beneath the original attestation clause. Signature held not to be that of a subscribing witness.

The opinion of the court below as to the sufficiency of the Cooksey certificate as an attestation (Rec., p. 138) is not sustained by the case of Adams *vs.* Norris (23 How., U. S., 358) cited therein. The circumstances in the two cases are radically different. A careful examination of that case will show that the law under which it was applied is entirely different from the Act of Maryland, under which we are proceeding. The law of California at the time the will in that case was made, was under a custom that had been followed in that jurisdiction for many years.

The law did not require the formalities required by the law of the District. While it seems that it was necessary to have three witnesses to a will, under the Mexican law, yet by custom and usage in California, only two were required.

It will be seen by that case that Roberto T. Ridley, sindico Nathen Speare and Guillerno Hinckley, all subscribed distinctly beneath that of the testater and the

word "witness" is placed directly opposite their names. While the law there required the contents of the will to be known to the testator or that it be read in his presence yet the evidence showed that the testator did know the contents, and as said before, the signatures of the witnesses appearing in the place where they are found, immediately under that of the testator, the presumption might easily be drawn that the requirements of the law, namely, that the contents of the will was known to the testator, had been complied with. Besides it was fully proven that the custom of having only two witnesses to a will had been long recognized in that State.

It clearly appears from the opinion in the case that the question was left to the jury to decide whether or not by the custom prevailing in the State more than two witnesses were required. The court said:

> "The custom under consideration was one of general nature and its existence for the period must be assumed from the verdict of the jury. It is a rule of property prevailing in its application and necessary to be known in order that judicial administration shall be carried on."
>
> "The recognition of such a rule, if it exists was therefore, to be looked for from the supreme tribunals of the State of California. In the case of Panuad *vs.* Jones, 1 Cal., 497-505, the Supreme Court say: The custom with respect to the execution of wills, so far as the testimony goes, appears to have prevailed generally and for a long time in California. It may have been the universal practice from the first settlement of the country." In Castro *vs.* Castro, 6 Cal., 158, this observation is cited and the court say: "that it is shown from the testimony of various witnesses, that two (wit-

nesses to a will) were sufficient under the custom of California." The same fact is restated in the case of Tevis *vs.* Pitcher, 10 Cal., 465. Nor is such a change in the mode of transfer of property a singular fact in the history of the American States. Several cases are mentioned in the opinion of the court in Panuad *vs.* Jones, above cited, and a similar instance is mentioned in Fowler *vs.* Shearer, 7 Mass., 14.

The question under consideration (by the law of California at that time) was whether the testator understood the wording of the will. It was admitted in that case that the genuine signature of the testator, the Sindico, and witnesses appeared on same. Proof was also made that the testator had stated to various witnesses how he had devised his property, which was found to coincide with the will; and necessarily it is to be presumed, if a man knew how he had devised his property by will, he knew the contents of it. And as said before it might well be that Roberto T. Ridley, the sindico, was one of the witnesses, all of them having signed at the same time, immediately under the signature of the testator. The testator in that case by the words of the codicil, says he desired executing it in conformity to the laws of the Mexican Republic; the language is "do make and declare it to be my will and intention, in presence of the two Alcaldes of this jurisdiction, his secretary and two witnesses of assistance as follows" etc. The admission or declaration offered as evidence was competent testimony says the court.

But what a different case we have here; while it is a fact that the paper purporting to be a certificate "J. D. V. 3" which is relied on as supplying the third witness,

states that the testator attended before the subscriber and acknowledged the paper to be his will, this might have been done and the signature of Cooksey and his seal of office fixed while he was a mile away from Thomson.

The Court of Appeals on page 139, say:

> "The only element of an attestation wanting is that it is not stated to have been signed by the subscriber as a witness at the request of the testator."

The law specifically requires the witness to attest the will in the presence of the testator and the authorities hold that strict compliance with the requirements is necessary. There is no doubt that where the names of three witnesses appear in the proper place with other corroborated proof that the testator intended to devise property situated in a certain place, all the witnesses being dead, it may be presumed that he knew the contents of the will and that the law had been complied with. But in this case how can the presumption be indulged in?

The Court of Appeals say, in the statement of the case, (Rec., p. 135):

> "The certificate was written on the second and last page of the will and it is said in the margin of it, but whether this means alongside of any other writing or at the end of the will does not very clearly appear from the record."

Was it the duty of the plaintiffs in the case to show on what part of the will the certificate was? The copy of the certificate referred to was not attached to the will; it does not purport to be. It is claimed it was photographed as a separate instrument. How can any one know, who has not examined the original paper, if there be such, on what part this certificate is?

It clearly appears from the evidence of Lomer and Linthorne, the alleged subscribing witnesses, that if three witnesses were intended a third one was at hand at the time the two signed. The court below (Rec., p. 139) says: "Cooksey is charged with authority to take acknowledgments of deeds." He may also certify papers; Sec. 1707, R. S. U. S. The court further says "and may have been called upon to certify the will through mistake."

What becomes of the *animus attestandi*, if such be the case?

The evidence in this case shows that Thomson had only been out of the insane asylum a short time when it is alleged this paper was made; under such circumstances, the rule as to execution of wills should be adhered to more rigidly, as is said by the authorities, otherwise the requirements of the law as well be obliterated.

Matter of O'Dea, 84 Hun., 591.

It may be well to mention here the fact that plaintiffs offered in evidence a copy of a paper purporting to be taken from the records of the Probate Court in England (Rec., p. 49). This paper was offered in evidence only for the purpose of showing that the certificate of Cooksey did not appear on the original paper when certified by the register and the consul-general on May 5th, 1887. And for the further purpose of showing that the signature of Cooksey to the certificate was not considered by the English courts as the act of a third witness. And for the further purpose of showing that the signature of the testator did not appear on the first page of the will as certified in the testimonium clause. All of this was done for a specific purpose and was evidence for no other purpose.

Yet the Court of Appeals in an endeavor to avoid the defect of want of proof of the contents of the paper offered in evidence by defendants, say (Rec., p. 137):

> "An identical similar copy was subsequently introduced in evidence by the plaintiffs themselves in rebuttal."

If the paper being in evidence solely for the purposes named it was evidence for no other purpose.

Thomson on Trials, Sec. 834.
Walderon *vs.* Walderon, 156 U. S., 381.
Abbot *vs.* Pearson, 130 Mass., 191.
Kribs *vs.* Jones, 44 Md., 396, 409.
Irish Society *vs.* Bishop of Derry, 12 C and T, 641.

This evidence, if it tended to show anything, showed that there were only two witnesees to the alleged will. And it further showed a very suspicious circumstance; the testator certifies that he signed the will twice, namely, on both pages of same, while as matter of fact, his name does not appear on the first page of either paper.

If the evidence offered by the defendant was insufficient to show the contents of the paper, it should have been excluded at the time. And if error was committed in admitting same, it cannot be said that it would be cured by evidence offered on behalf of the plaintiff, for the specific purpose of rebutting or showing want of evidence in the case.

Seventh Assignment.

This assignment of error is based upon the striking out by the court, over plaintiffs' objection of so much of the answer of Annie Lowman (Thomson's

housekeeper) as gave as her reason for leaving Thomson's employment in March, 1886, the fact that Dr. Scott, his medical man, said "it was not safe for her to stop there."

The will is said to have been executed February, 24 and 25, 1886, and in the following month, and while Thomson was out of the asylum on probation and in charge of Dr. Scott and two guards, the witness is informed by the medical attendant, Dr. Scott, that it was not safe for her to continue in her employment, and for this reason she left.

The relation which Dr. Scott bore to Mr. Thomson was one of authority; the fact was one peculiarly within his knowledge and was one in respect of which it was his professional duty to speak, and it became her duty to act upon the statement.

Such a statement coming from one so employed about the house, in an ordinary capacity even, would have been admissible as part of the *res gestæ* of a situation which involved the sanity of Thomson,

Am. and E. E. of Law, Vol. 22, p. 802, duty of physicians, etc.
Beck *vs.* German Clients, 78 Iowa, 696.
Carpenter *vs.* Blake, 75 N. Y., 12.

The *res gestæ* is not limited to a particular moment, but depends upon the circumstances of each case, and in the present case covered the period, at least, which elapsed from Thomson's commitment to the asylum on December 15, 1885, until his final discharge on June 1, 1886.

Eighth Assignment.

This assignment is based upon the exclusion over plaintiffs' objection of so much of the answer of said

Annie Lowman to the "17th" interrogatory propounded to her as stated that her mother would not "let her go near" said Thomson after the execution of the alleged will (Rec., p. 28).

The mother was also an inmate of the house, and the answer was admissible under the doctrine of *res gestæ*.

Besides, it cannot be said such evidence is hearsay. There are no words here that were given to the witness by others. It was not that the mother said anything at all about Thomson, but on the contrary, the statement is that the witness was restrained from going near him.

Ninth Assignment.

This assignment is based upon the exclusion over plaintiffs' objections of the answers of Hiscock, a witness for plaintiffs, to the 24th interrogatory propounded to him under the commission. In response to the question, "who had charge of Mr. Thomson's affairs after he was sick," the witness answered:

> "I telegraphed to the old lady Thomson against Mr. Thomson's wishes," (he?) "saying that the wolves will be here in time" (Rec., pp. 30–31).

This remark of the testator, made before he was taken to the asylum and a short time before the execution by him of the alleged will, indicated his feelings towards his English relatives, who subsequently appear in the will as beneficiaries in the main of his estate. Standing alone, no reason is apparent why it was not a competent fact for the jury to consider as bearing upon the questions of mental soundness and undue influence at the time the will was executed, especially was it significant and important, in view of the further fact disclosed by the testi-

mony, that said Thomson had previously executed a will, *all in his own handwriting*, in which his English relatives, who are the principal beneficiaries under the will in question, were not mentioned.

In Throckmorton *vs.* Holt, 180 U. S., this court held that declarations of the testator not part of the *res gestæ* were inadmissible upon the issue of forgery or revocation of the will, saying, among other things, p. 573:

> "Although in some cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental *condition*, yet they are generally stated in cases where the mental *capacity* of the deceased is the subject of the inquiry, and in those cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject."

Tenth Assignment.

This assignment is based upon the exclusion of evidence proffered by plaintiffs through Lane, an English lawyer, as to the requirements of the law of England in regard to the admission of insane persons to asylums and in refusing to permit said Lane to testify that the volume of British statutes produced at the trial contained such law (Rec., 31–35).

From the statute, which is general in its nature as applying to all insane asylums, both public and private, it appears that certificates as to insane condition of patients from medical men, based upon personal examination and inquiry, are made a prerequiste to the admission of such patients to such asylums, and that a failure to observe such rules are made a punishable offence. In addition to such certificates an application for such admission is required from a relative,

"No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must like other facts, be proved, before they can be received in a court of justice."

Hanley *vs.* O'Donoghue, 116 U. S., 1, 4.

"A volume of foreign statues when authenticated by an oath of a competent person is admissible."

Jones *vs.* Moffat, 5 S. & R., 523.
Watson *vs.* Walker, 23 N. H., 471.

"It appears to have been at one time considered that although an unwritten law might be proved by witnesses professing competent professional skill, yet the written law of a foreign State ought to be proved by a copy of the law properly authenticated. But the doctrine has been expressly overruled and it has now been decided in the House of Lords that foreign law must in every case be proved by a witness who is skilled in the subject though he may refer to foreign law books to correct or to confirm his opinion; the law itself can not be taken from any book."

2 Ph. Ev. (C. & H. Notes), 361.

Eleventh Assignment.

It was the intention of the plaintiffs to follow up the law by proof of the certificates of physicians Aitken and Scott and of Cunningham, made in the performance of a statutory duty. When the certificates and application were offered in evidence by plaintiffs they were excluded by the court on defendants' objection; this exclusion is the basis of plaintiffs' eleventh assignment. Dr. Manning

testified that Cunningham procured the admission of Thomson to the asylum; the certificates of Drs. Scott and Aitken accompanied his application; he knew the statements as to Thomson's mental condition made in them and adopted such statements, which indicated a thoroughly impaired mental condition of Thomson on December 15, 1885. He states in his application under date of December 12, 1885, that Thomson is a person of unsound mind; that the duration of his existing attack had been two or three months, etc. (Rec., p. 40).

The mental infirmity of Thomson had existed for the period of three months previously; yet, with an immediate previous history of five months of utter incapacity on the part of Thomson, as Cunningham knew, he and members of his family appear as principal objects of Thomson's bounty under a will of February 24, 1886.

These facts certainly had a bearing upon the question of undue influence on his part in obtaining the execution of such will, and should have been submitted to the jury upon the issue of undue influence.

Furthermore, as facts bearing upon the mental condition of Thomson at the time of the execution of the will, they would seem to be clearly within the *res gestæ*. The certificates were not volunteer statements, but were made under the compulsion of the statute. The proceedings did not become less part of the *res gestæ* because required by the statute; the fact that they were required by the statute more emphatically made them so.

The case of Ormsby *vs.* Webb, 134 U. S., 65, which the defendants relied on in the trial court, deals with a different situation, and has no bearing upon the question.

In that case one of the issues was undue influence on the part of Harriet C. Stewart, a specific and residuary

legatee under the will. The trial court refused to admit the evidence of a witness for caveators to the effect that, after the execution of the will, said Harriet Stewart, in response to a question as to why certain parties had been left something under a former will and excluded in the last one, said, "that they tried to prejudice the admiral (testator) against her," and that she "had had them left out of the last will on that account."

Exception was taken to this ruling and this court in dealing with the exception, held that the exclusion of the declaration was right; that if a proper foundation had been laid her declarations could have been proved for the purpose of impeaching or discrediting her as a witness for caveatees, but it was competent for no other purpose. "She was not the only legatee who was interested in the issues to be tried."

Letters of Mrs. Stewart written to counsel before the execution of the will, urging him to attend at once to its preparation and execution, were admitted (see Vol. 20 of records and briefs in this court, page 15). The case went to the jury with a comprehensive instruction upon the subject of undue influence (4th issue, ib., 66).

We submit that the action of the court below in excluding Cunningham's application for admission of Thomson to the asylum and the medical certificate sent by him with it finds no support in Ormsby *vs.* Webb.

See—

Davis *vs.* Calvert, 5 G. and J., 269.
Thaln *vs.* Bankshead, 99 Mass., 112.
Atkins *vs.* Sanger, 1 Pick., 192.
Davis *vs.* Mason, 109 Mass., 169.

The court below in the opinion (Rec., p. 141) say these papers were properly ruled out at the trial "especially in

view of the fact that it does not appear why the testimony of the physicians themselves might not have been taken." The court presumes that these two physicians, who it is shown, lived in a foreign country, could have been called upon to give evidence, while the non-production of original papers in the same country is excused and a presumption drawn that they could not be produced with no evidence whatever on which to base such presumption. It would seem that there is no difference between the findings of these physicians of the fact of insanity under the proof in the case and that of a lunacy proceeding. The law of that country fixed this mode of inquiry instead of a lunacy jury and if their proceedings were had under the law of that country, as shown by the evidence of the witness Lane, this finding stood in no other light than an inquiry authorized by law.

Twelfth Assignment.

This assignment is based upon the exception (Rec., p. 47) taken to the refusal of the court to allow the witness Weir, Jr., to answer the questions propounded to him in relation to the manner of executing papers or how certificates to signatures were obtained from the vice-consul in the absence of the consul at Southampton, England. The questions began on page 45 and end with the exception to the ruling on page 47. The evidence offered (Rec., p. 49) shows that it was the custom of the office to make certain certificates to documents, and that the consulate charged the sum of $2 each for such service and accounted to the Treasury Department for the amounts so received. While there appears to be but a single exception to the ruling out of all these questions, yet, if all are erroneously ruled out, which we contend is the case, the exception will apply to all.

Harrison *vs.* Hamner, 99 Ala., 603–606.
Gray *vs.* Elzroth, 10 Ind., App., 587–593.

The object of these questions, as is apparent from the record, was to show that the vice-consul had given such certificates as is found on the copy of the alleged will to other persons, and to ascertain what was his manner of doing so. The court seemed to be impressed with the idea that because the witness did not know the contents of the papers, any answer from him would be inadmissible; but we submit that this was not so. If it could have been shown by the witness that it was a common thing for the vice-consul, in the absence of the consul, to certify to such papers, when taken to the office, by anyone (a messenger in the consulate, for instance) without seeing the party who made the signature, it would certainly have been competent to go to the jury, as bearing upon the question whether or not Thomson, the alleged testator, was present when the certificate in the margin of the will was signed. The evidence, while doubtless slight, it seems to us was competent inasmuch as the jury were allowed to indulge in a presumption in favor of the alleged certificate without any evidence to support it.

Could the witness, by answering any one of the questions ruled out, throw any light upon the subject and enable the jury to judge of the probability or improbability of Thomson's presence, when he, Cooksey, made the certificate in question? If it could, then the answer should have been allowed.

> "It is well settled, if evidence is offered conducing in any reasonable degree to establish the probability or improbability of the facts in controversy, it should go to the jury."

Insurance Co. *vs.* Weed, 11 Wall, 438.

In the case of Plumb *vs.* Curtis, 66 Conn., 166, the court said :

> " Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the tryer in the determination of the issue.
>
> " Evidence is admitted not because it is shown to be competent, but because it is shown not to be incompetent.
>
> " No precise and universal rule is furnished by law ; the question must be determined in each case according to the teachings of reason and judicial experience."

Citing—

Insurance Co. *vs.* Weed, 11 Wall., *supra.*

The objection to the question is only because the witness did not know the character of the papers certified; not that it was incompetent or irrelevant.

If Cooksey had been in the habit of certifying to papers in which, by the form of the certificate, he made it appear that the person acknowledging was present, when in fact he was not, and it could have been proven by this witness that he did so but in a single instance, such evidence would have been proper for the jury to consider.

In the case of Lane *vs.* Mo. Pac. R. R. Co., 132 Mo., 19-24, the court said :

> " The quotations (authorities cited) serve to show, and it seems very clear, that evidence tending to show *intoxication in a single instance may go to the jury* and justify the inference by them of want of ordinary care," etc.

Citing—

Insurance Co. *vs.* Weed, *supra.*

The questions and answers ruled out (in this case) are stated in the opinion, at page 33, and the action of the court was held error sufficient to cause reversal.

And in the case of Trul *vs.* True, 33 Me., 367, the court said:

> "It was held that testimony can not be excluded as irrelevant which would have any tendency, however remote, to establish the probability of the fact in controversy."
>
> "A party seeking to prove or disapprove the proposition may proceed step by step, offering link by link."
>
> "Whatever is a condition, either of the existence or the non-existence of a relevant hypothesis, may there be shown."
>
> 1 Whart. Ev., (2d ed.) secs., 20-21.
> See, also, Dodge *vs.* Wiel, 158 N. Y., 346, 350.

In the case of Roberts *vs.* The Continental Ins. Co., 41 Wis., 326, one of the issues was whether the firm of G. & H., agents of the defendants, knew of an existing insurance in the Phœnix Company when they issued the policy of the defendant in suit and did not inform their principal and obtain its consent.

The following questions were put:

> "Q. Is there any rule as to the Continental that you follow when you insure a piece of property, with reference to the amount of insurance?" (Ruled out.)

"Q. Assuming the value of the property to have been to your knowledge $1,800 and no more with $600 insurance already on it, would you have put $1,200 more on it?" (Ruled out.)

The court said, page 328:

"If the questions might have tended in any reasonable degree to establish the probability or improbability of the fact in controversy, they should have been received."

Citing Insurance Co. *vs.* Weed, 11 Wall., *supra.*

For this error the lower court was reversed.

It seems to us that inasmuch as the court permitted this paper (notwithstanding its absolute want of identification) to go to the jury as the act of a witness, when the evidence showed conclusively it was not so intended, this evidence should have been admitted. It is not necessary to have consul-generals or even vice-consuls to witness wills. There were other witnesses at hand when the first two signed (Lomer's Ev.,) if three had been intended.

Thirteenth Assignment.

This assignment is based upon the exception taken to the granting of the defendant's second prayer for instructions (Rec., p. 56).

By said instruction the jury were told that in case they found the will properly executed (without regard to insanity or undue influence) the plaintiffs were estopped to claim title under certain of the heirs at law of the alleged testator.

That—

> "it appears in this case that those two would be entitled to 16-100 of the property, and as to that portion of said property they shall return a verdict *for the defendants, if the jury so find that the will* was executed to pass real estate in the District."

This instruction is extremely misleading, involving, as it did, a duty upon the jury to find two verdicts, one for the plaintiffs and one for the defendants, as well as to determine a matter of law, depending upon facts to be found by them.

Even if there had been any evidence to support the paper purporting to be a copy of the will, the most the court should have done was to say to the jury that if they found from the evidence that the signature of Cooksey was intended to be that of a subscribing witness, and that he signed in the presence of the testator, then the plaintiffs could not claim the interest that would have descended to William Thompson Weir and Thomas Haig; and should they so find, even if they found the testator incompetent to make a will or that the same was obtained by undue influence, the plaintiffs would only be entitled to a verdict for seventy-five one-hundredths of the property claimed.

The defendants can not escape the responsibility of this instruction. It was prepared by their counsel and it was incumbent upon them to see that it was without misleading and confusing features.

> United States *vs.* Jones, 8 Peters, 389, 414-5.
> B. & O. R. R. Co. *vs.* Thompson, 10 Md., 77.
> 2 Thompson on Trials, Sec. 2349, see p. 1706, foot of section.

In the case of Gordon *vs.* Richmond, 83 Va., 436, 442, the court say :

> "Indeed, any instruction calculated to mislead the jury, whether it arises from ambiguity or any other cause, ought to be avoided, and if given it would oblige the appellate court to reverse the judgment."

Thomas *vs.* State, 67 Ga., 766; State *vs.* Jones, 20 W. Va., 764, and Archer *vs.* St. Clair, 49 Miss., 345, are also to the effect that the court should not permit the jury to be confounded or confused by the language in which the instructions are couched.

Fourteenth Assignment.

This assignment is based upon the plaintiffs' exception to the giving by the court of the defendants' third prayer (Rec., p. 56). This prayer, it will be seen, declares that defendants' evidence made out a *prima facia* case and placed the case before the jury as if every essential requirement of the statute in relation to the execution of the will had been proved by competent evidence, and that unless the evidence for plaintiffs disproved it, they must find for defendants. The "preponderance of the testimony" referred to in the prayer was meaningless. It did not involve a consideration of defendants' testimony, for the previous portion of the prayer had practically eliminated that from their consideration. The court said:

> "The jury are instructed as a matter of law that the introduction of the will in this case by the defendants and the testimony accompanying same *constitute prima facie evidence that said will was signed by William Thomson and duly attested to pass real estate, etc.*

The words "*prima facie evidence*" should not be submitted to a jury.

2 Thompson on Trials, sec. 2327.
B. & O. R. R. Co. *vs.* Beasley, 7 Md., 312, foot of page.

As in the former instruction the court told the jury that the defendants had produced the will in evidence, when, in fact, a paper purporting to be a copy was all that was offered. And further told them, as a matter of law, that the will was duly executed. No case can be found where it was held that from the mere finding of the name upon the margin of a will, over an official seal which shows a mere acknowledgment, and without other proof a presumption of law arises that the person so signing meant to sign as a subscribing witness and that he performed the act of a subscribing witness as required by the statute.

The authorities are uniform to the effect that in order to raise a presumption of fact of due execution, the execution of the will must appear regular upon its face, and they say *in no case will such presumption of fact be indulged in unless the will appears upon its face to have been duly executed.* See authorities cited under the sixth assignment.

It is not allowable in any case to assume a state of facts not proved, and to direct the jury upon such assumption as this tends to mislead the jury.

Washington and Georgetown R. R. Co. *vs.* Gladman, 15 Wall., 401.
N. J. Life Ins. Co. *vs.* Baker, 94 U. S., 610.
11 Amer. and Eng. Ency. of Law, 1st ed. 250.

The most the court is permitted to do *when a will appears regular upon its face,* namely, *when the signatures of the witnesses appear under a regular attestation clause or in the usual or customary place beneath the name of the testator, under the word "witness,"* and the witnesses are dead, is to leave the whole question to the jury under proper instructions, stating the requirements of the law, so that they may find whether or not the requirements were complied with. The court told the jury in this case that there was *prima facie* evidence of due execution. *Prima facie* evidence is—

> "such evidence of a fact as in the judgement of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose."
>
> Kelly *vs.* Jackson, 6 Peters, 222.
> Lovell *vs.* Drainage, 159 Ill., 203.

But how can it be contended that there was such evidence in this case? Where does the court find any evidence whatever to show that Cooksey was a subscribing witness? Could the court have said, if there had been no jury to submit the matter to, that the fact was proven? (Clark *vs.* Turtin, 11 Vesey J., *supra.*) *It can not be said that if there is no evidence to warrant a finding, the verdict of a jury would change the situation.* (Beyer *vs.* Lefevre, 186 U. S., 114). In the first place, they would have to presume that Cooksey meant to sign the will as a witness *against the positive evidence of Lomer and of Linthorne and of the certificate itself to the contrary,* then have to presume upon this presumption that he fulfilled the requirements of the statute in performing such act. Can it be said that a presumption based upon an inference will constitute *prima facie* evidence? Such a presumption is

not evidence at all. If circumstancial evidence is relied upon, the circumstances can not be presumed.

In the case of the United States *vs.* Ross, 92 U. S., 284, the court said:

> "Because 42 bales (of cotton) were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimants' bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting upon the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain.
>
> "Whenever circumstantial eivdence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

Starkie on Evid., p. 80, lays down the rule thus:

> "In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought too be made, the iaw requires that the latter should be established by *direct* evidence, as if they were the very facts in issue. It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and deduction form them and does not permit a decision to be made on remote inferences."

A presumption is only an inference drawn from some other fact proven or admitted.

Home Ins. Co. *vs.* Weed, 11 Wall., 441.

The evidence of Lomer and Linthorne is directly opposed to the supposition of Cooksey's being a subscribing witness. (See their evidence, record, pp. 7 to 15.) And a presumption can not be allowed against an established fact.

> "Presumptions are indulged in to supply the place of facts; they are never allowed against ascertained and established facts; when these appear the presumptions disappear."

Lincoln *vs.* French, 105 U. S., 617.

By the instruction complained of the jury were told that the introduction of the copy of the will, without any evidence accompanying it, showed the act of Cooksey to be all the law required. His (Cooksey's) act was separate and distinct—done upon a different day from that which the two alleged witnesses claimed to have signed, and the case as to him (Cooksey) stood as if *none of the witnesses had testified or been produced.* The burden is upon the proponents of the will to show by preponderance of the evidence that such paper is duly executed, and the heir at law may rest safely upon the presumption that the estate is cast upon him by descent until this be done.

Tyler on Ejectment, 495.
Lewis *vs.* Lewis, 11 N. Y., 224.
Delafield *vs.* Parrish, 25 N. Y., 10.

Yet by this instruction the burden is placed upon the heir at law to show that what the law required was not done, without any proof whatever from the proponents to show that in fact it was done.

Taking into consideration the circumstances of this case, was it proper for the court to tell the jury that the requirements of the law were *prima facie* shown. We do not believe that it will be seriously contended that where there be a doubt in any such case, it should not be resolved in favor of the heir at law. While the evidence shows that Cooksey did not subscribe as a witness, yet if it did not so indicate any question of doubt should have been left to the jury. The court decided it for them. It is said:

> "A court can not submit a question to the jury unless there is some evidence to support it, as they are not allowed to speculate upon conjectures or guess away established rights."

Michigan Ins. Co. *vs.* Bank, 9 Wall., 544

Fifteenth Assignment.

This assignment is based upon the plaintiffs' exception to the fourth prayer of instruction given on behalf of the defendants (Rec., p. 59).

Like the former two, the instruction does not speak of the paper purporting to be a copy of the will, but as the will itself, thus taken may all questions as to the existence or contents of the alleged will. Besides this instruction placed the burden upon the plaintiffs to show incompetency. It cannot be said that where such insanity as is shown in this case in an old person that this instruction was proper. The following authorities are that proponent should take such burden.

Hodge *vs.* Fisher, Pet. C. C., 163.
Mo. & Pac. R. R. *vs.* Brazee, 72 Tex., 273.

Wright *vs.* Wright, 139 Mass., 177.
Boynton *vs.* Meeker, 28 N. J. Law, 247.
Beasley *vs.* Dennison, 40 Tex., 416.
McGinnis *vs.* Kempsey, 27 Mich., 363.
Elliott *vs.* Welsey, 13 Mo. App., 19.
Perkins *vs.* Perkins, 39 N. H. 163.
Smee *vs.* Smee, 5th L. R. P. Div., 84.
Comstock *vs.* Hoblyne, 8 Conn., 254.
Delafield *vs.* Parrish, 25 N. Y., 10.
Taff *vs.* Hosmer, 14 Mich., 309.
Cromshield *vs.* Cromshield, 2d Gray, Mass., 524.

In the case of Ford *vs.* State, 35 L. R. A., 117 (Miss.) The case made was not near as strong as this and the court below was reversed for just such an instruction. See also great number of cases cited under this report.

All the authorities are to the effect that where violent insanity is shown to have existed a short time before the will was executed, as in this case, the burden is upon the proponents to show testamentary capacity at the time the will was executed. Under the circumstances of this case the most that could have been properly done in favor of the defendants was to submit the whole question to the jury without placing the burden upon either side. The insane delusions were clearly proven to have existed in the testator's mind for four months prior to and through the whole month in which it is claimed the will was executed.

> "Where delusions are once established it is incumbent upon the proponents of a will to show a valid act."

Brooks *vs.* Townsend, 7 Gill. Md., 31.

In the matter of O'Dea, 84 Hun., N. Y., 591, the court said:

> "In determining the capacity of the testator in this case, as his health was impaired by disease and he was at an advanced age, it is the duty of the court to scrutinize all the evidence relating to the circumstances attending the preparation and execution of the will, and under the rule laid down in Matter of McGraw, 9 App. Div., 372, by this court and under the circumstances there detailed, as well as the circumstances here detailed, it is the duty of the court in determining questions of testamentary capacity to look with greater care and solicitude into the case, and adopt a more rigorous rule where the decedent is weak and suffering than if he was in comparative health."

Was this rule followed in this case? No more favorable rulings could have been allowed, if the testator had been shown to be a giant or a warrior upon a field of battle the day he made the will. Yet such rulings were made in this case where the evidence showed a maniac on the verge of the grave, with a fatal disease.

Insanity once established is presumed to continue. 11 Am. & E. E. of Law, 1st ed., 156 and note 1.

In this case Dr. Richardson, the expert on mental diseases, testified that the hpothetical case stated (Rec., p. 52) indicated *dementia* (which is the worst form of insanity), *and on account of the age of the alleged testator it was improbable that the individual could be entirely well after the acute symptoms of excitement had subsided and that there would not remain a certain amount of weakness of mind.*

The evidence tended strongly to show disease of a permanent nature in Thomson. Such being the case and it being a conceded fact that insane delusions were shown to have existed only a short time before the date of the

excution of the alleged will, the placing of the burden of proof upon the plaintiff was unwarranted. See opinion in the case of Armstrong *vs.* State, 30 Fla., 170, where many authorities are collected, holding that where insane delusions are established burden of proof is shifted.

The evidence in this case shows that the insanity of Thomson *was the result of old age and Bright's disease* (Manning's evidence, Rec., p. 37). *It is a well-known fact that neither are curable, and it proved so in this case, for Thomson died within one year.*

In the case of Physio Medical College *vs.* Wilkinson, 108 Ind., 314, 318, 319, the court said:

> "The presumption as to the continuance of the insanity is one of fact, says an approved author, varying with the particular case, 2 Whart. Ev., Sec. 1253.
>
> "The rule as stated by this court in a case closely analogous, is that 'when it appears in proof that a person was at any given time of unsound mind (unless for some temporary transient cause) the legal presumption is that the state of mind continued until the contrary is made to appear.'
>
> "The rule does not apply to cases of occasional intermittent insanity, but does to all cases of apparent confirmed insanity of whatever nature.
>
> "State *vs.* Wilner, 40 Wis., 304.
> "Brooks *vs.* Townsend, 7 Gill., 10.
>
> "The complaint before us presents a case of mental unsoundness accompanied with and probably resulting **from infirmities of old age. There is no presumption, either of law or of fact, that passing years release from such impairment of reason."**

The case of Beaver *vs.* Sprague and Blake, 93 Iowa, 576, is to the same effect.

Furthermore, this instruction was also misleading, as being in conflict with the plaintiffs' fourth prayer as granted (Rec., p. 72), and was erroneous for that reason.

B. & O. R. R. Co. *vs.* Thompson, 10 Md., 77.
Haskins *vs.* Haskins, 41 Ill., 197.
Thompson on Trials, 2326 and 2327.
Pittsburg, etc., R. R. Co. *vs.* Krouse, 30 Ohio State, 222-240.
T. W. & W. Rwy. Co. *vs.* Morgan, 72 Ill., 155.

Sixteenth Assignment.

This assignment is based upon the plaintiffs' exception to the sixth prayer given for the defendant (Rec., p. 57.)

By this instruction the jury were also told that the will was before them. And further, that the proof of incapacity (temparary or permanent) at any time prior to the making of the will would not relieve the plaintiffs or parties assailing the will from the necessity of establishing incapacity at the time of the making it.

We submit that this instruction is erroneous, for by it the jury must necessarily infer that it mattered not to what extent the insanity was found to exist, it would still be incumbent upon the opponents of the will to show that Thomson was, on both the 24th and 25th of February, 1886, not of sound mind. There is no evidence offered by the proponents of the will to *show the condition of Thomson on the 25th of February, 1886*, the day after the paper is alleged to have been witnessed by Lomer and Linthorne.

It is clearly in conflict with the plaintiff's fourth prayer, even as modified by the court (Rec., p. 72). "*And that such insanity was of a permanent nature.*" By defendants' sixth prayer the jury were told that proof of incapacity at any time prior to the making of the will would "*not relieve plaintiffs from the necessity of establishing*" mental incapacity at the time the paper was executed. It is error for the court to give such conflicting instructions. Both can not be right, and clearly the one granted as modified by the court, on behalf of the plaintiffs, was more favorable to the defendants than the law permitted. This instruction, on behalf of the defendants, clearly swept away all rights of the plaintiffs under the one given in their behalf.

> "An erroneous instruction given for either side is not cured by another more accurate one given for the other side."
>
> Ill. Cen. R. R. Co. *vs.* Maffit, 67 Ill., 431.
> People *vs.* Casey, 65 Cal., 260.

An erroneous instruction is not cured by another instruction given in the case.

> Pittsburg R. R. Co. *vs.* Krouse, 30 Ohio, St. 222.

In that case the court said :

> "The error is not cured by a general instruction ; every charge should be predicated on the issues and facts of the case. A specific charge based upon particular facts which, if followed by the jury, causes an errorneous verdict and is not cured by a general charge."

In the case of Steinmyer *vs.* People, 96 Ill., the court said :

> "*It is true the instruction on the same subject given on behalf of the defendants laid down the law* correctly. But that was not enough, the jury may have disregarded the instructions for the defendant and followed those given for the people. They had as much right to follow the one as the other, and it is impossible to say which instruction controlled the deliberations of the jury. We are, therefore, of the opinion the instruction was calculated to deprive the defendant of a fair trial, and the judgment should be reversed."

To entitle an instruction to be given it must be correct in point of law.

> Thompson on Trials, Sec. 2349.
> Grand Trunk R. R. Co. *vs.* Latham, 63 Maine, 177.
> Snow *vs.* Penobscot Ice Co., 77 Maine, 55.
> Thompson on Trials, Sec. 2353.
> Jones *vs.* Talbot, 4 Mo., 279.
> Chapman *vs.* Erie R. R. Co., 55 N. Y., 579.

Furthermore, the prayer is argumentative. By this instruction the jury are told: "A testator has a right to make a will and dispose of his property as he pleases," and that "such right is among the dearest and most sacred rights of a citizen." However true these propositions, it is also true that the right of the heir is equally sacred and he has a right to controvert a will he believes to be invalid. The obvious effect of this statement made by the court must have been to create an impression on the minds of the jury adverse to the plaintiffs, and necessarily they took it as an intimation that the court was favorable to the will.

It is a well-known fact that juries are too apt to catch at any conclusion or inference thrown out by the

court and follow the same in rendering their verdict. A special instruction of this kind should not be given.

Thompson on Trials, Sec. 2301, and cases cited under note 1.

Seventeenth Assignment.

Special stress is laid on this assignment, for it clearly appears that the court was in error when it said "there is no evidence."

This assignment is based upon the plaintiffs' exception to the giving of the defendants' seventh prayer (Rec., p. 57). This prayer reads as follows :

> "The jury are instructed that, while non-experts have been allowed to express their opinions as to the mental capacity or incapacity of William Thomson, the jury should consider the opportunities of such witnesses to know William Thomson, and the reasons upon which the witnesses rest their statements of opinion as to William Thomson's sanity or insanity ; and they are further instructed that the opinion of a non expert witness as to the mental capacity of William Thomson is worth nothing as evidence unless supported by proof of facts and circumstances which, in the judgment of the jury, justify the conclusions reached by them. *They are further instructed that there is no evidence in this case of any opinion of any non-expert witness that William Thomson was, at the time he made the will, incapable of making a valid deed or contract ; nor is there any statement of any non-expert witness as to the mental capacity of William Thomson to make a valid deed or contract at the time said will was executed*" (Rec., p. 67.)

We presume that what was meant by the word "non-expert" was "non-professional" and non-subscribing

witness. As the only witnesses to the sanity of Thomson examined on behalf of the proponents of the will were Lomer and Linthorne, the alleged subscribing witnesses, it will be plainly seen that this instruction could have relation only to such non-expert witnesses examined on behalf of plaintiffs, and its effect was not only to detract from the force of the plaintiffs' evidence, but cut out and take from the consideration of the jury vital testimony given on behalf of the plaintiff of the condition of Thomson's mind at the time it is alleged he made the will.

The evidence given by Annie Lowman and Fred Hiscock shows that this instruction was absolutely unwarranted. Annie Lowman was employed by Thompson as a housekeeper from 1882 until March, 1886. By the copy of the alleged will given in evidence by the defendants it appears to have been executed February 24, 1886. After stating many acts of Thompson, indicating violent insanity, she says he was insane when taken to the asylum December 15, 1885. Dr. Manning's evidence shows he was released on probation on February 1, 1886, *in charge of attendants and returned home* (Rec., p. 37).

The answer of Annie Lowman to the 15th interrogatory (Rec., p. 28) was:

> "I left some time in March, 1886, because (Dr. Scott, his medical man, said) it was not safe for me to stay there. I saw him while he was at home daily, and several times a day. I waited upon him.
>
> "Q. Did he act as he had acted prior to his being taken to the asylum? A. I can not say, as I then saw very little of him, but from what I did see I thought him just as insane as before he went to the asylum, if not worse.

She futher states—

> "that any person could have cheated him or taken advantage of him after his return from the asylum. He was more easily persuaded than before he went away." (Rec., p. 28.)

Now, while this witness does not say or speak of the condition of Thompson, either on the 24th or 25th of February, the dates it is claimed that the alleged will was executed, yet her testimony bears directly upon his condition in the month of February, the time the paper is alleged to have been made. Even Cunningham seems to have been afraid to remain in the house with him *while he was looking after his affairs.*

> "*James E. Cunningham was not at the Thomson house until after his return from the asylum; after that he spent most of the time there, sleeping elsewhere at night.*" (*Annie Lowman's testimony*, Rec., p. 29.)

The witness Hiscock (Rec., p. 29), a clerk employed by Thomson in the consulate, had been so employed for about six years when Thomson became insane (Rec., p. 29). He says Thomson was insane when taken to the asylum, and states his violent acts. He does not remember the date of his return from the asylum; *says Thomson returned with two men as guards: do sane men go about accompanied by or under guards? When were these guards discharged, certainly not before June, 1886. The witness says: he was not in as good condition when he returned as before he was taken sick.*

> "Q. What did he do for the first few days after his return?

"A. He asked me questions over and over again.

"Q. What did he do in the first month after his return from the asylum that would indicate his condition? (Month the alleged will is dated.)

"A. He changed his ideas in all his transactions. He never appeared to be in his normal condition again, mentally or physically." (Rec., p. 30.)

This evidence clearly related to Thomson's mental condition and his competency to make a valid deed or contract, and covered the time when the alleged will was executed.

In the predicament of the evidence the instruction was wholly unwarranted and erronerous.

> "A trial judge must not single out isolated parts of the testimony and instruct the jury as to the law arising on the facts which such testimony tends to prove, and he must be careful not to give undue prominence to certain portions of it; especially he ought not to review only those facts which have a tendency to establish one side of the case."
>
> Thomson on Trials, Secs. 2345, 2330.
> Penn. R. R. *vs.* Lieb, 33 Pa., 318.

It is not allowable to assume as existing, facts not proved, and to ask a direction to the jury upon such presumption. This practice would tend to embarrass and mislead the jury.

> Wash. and Geo. R. R. *vs.* Gladman, 15 Wall. U. S., 401.

See also—

N. J. Life Ins. Co. *vs.* Baker, 94 U. S., 610.

Courts should not assume, in their instructions to juries that material facts upon which the parties rely are established unless they are admitted or the evidence respecting them is not controverted.

Bank *vs.* Hunt, 11 Wall., 391, 394.
Rehr *vs.* Conn. Mutual Life Ins. Co., 4 Fed. Rep., 362.

When there are disputed facts from which others may or may not be inferred, the court should submit them to the jury.

Maynard *vs.* Lumberman Nat. Bk, 11 Atl. Rep., 529.
Michigan Ins. Co. *vs.* Bank, 9 Wall., 544.

Eighteenth Assignment.

This assignment of error is based upon the refusal of the court to grant the plaintiff's fifth prayer (Rec., p. 60), and to the modification thereof (Rec., p. 72). The prayer as offered is in the following language:

V.

"The jury are further instructed that because a person can correspond with a friend or relative intelligently and carry on or attend to ordinary business matters, does not necessarily show that he is of sound and disposing mind and capable of making a will. That in considering the question of his mental capacity, they should take into consideration all the surroundings as disclosed by

the evidence, the AGE OF SAID THOMSON AND THE INSANITY OF HIS MOTHER AND UNCLE AND THE AGE AT WHICH THEY WERE AFFECTED. *The witnesses to the will were apparently strangers to the testator and therefore not capable of judging of his mental capacity so well as one who knew him, a friend or intelligent servant, for instance, who had known him for years; persons of unsound mind often succeed in controlling their actions to such an extent that all their outward appearances are rational and often their malady is not only successfully concealed from nonprofessional observers but from the experienced eyes of physicians.*"

The prayer given is in the following words :

V.

"The jury are instructed that because a person can correspond with a friend or relative intelligently and carry on or attend to ordinary business matters, does not necessarily show that he is of sound and disposing mind and capable of making a will (but such evidence is competent and may be properly considered by the jury as tending to show that he has such sound and disposing mind). That in considering the question of his mental capacity they should take into consideration all the surroundings as disclosed by the evidence."

The prayer as offered is fully warranted by the case of Hodge *vs.* Fisher, Pet. C. C., 163, both on question of insanity of Thomson's relatives and opportunity of the witness.

It will also be seen by the modification the court struck out of the prayer, as asked by plaintiffs, the portion which allowed them in determing the question of testator's sanity, to take into consideration the age of the testator,

the insanity of his mother and uncle and the age at which they were affected, and gave no instruction whatever as to this vital part of the evidence for plaintiffs, namely, that insanity had existed in the mother and uncle of Thomson.

The uncontradicted evidence in the case for plaintiffs showed permanent insanity in the mother of Thompson for many years, and also in his uncle, and was uncontradicted, and it showed also that Thompson was well advanced in years at the time he was attacked. These matters were excluded from the consideration of the jury; they were important and bore upon the question whether or not Thompson's disease was of a permanent or temporary nature, especially as the evidence further showed that one of the causes of his insanity was old age (Manning, Rec., p. 37). There can be no doubt that this evidence was competent, and to refuse this instruction bearing upon same was error.

Underhill on wills, 144, Sec. 103.

In Baxter *vs.* Abbott, 7 Gray, 71 the court said:

> "With the fact that the father and mother, or either of them, had been insane, that the insanity had appeared in them about the same age, its existence in the child is rendered more probable and is believed upon less evidence.
>
> "The transmission of the predisposition to insanity is a matter of general observation and is recognized by the best medical authorities.
>
> "Esquirol says this hereditary taint is the most common of all the causes to which insanity can be referred."

Esquirol on Mental Diseases Transmitted, by Hunt, 49.

Beck Med. Juris. (10 ed.) 725.
Taylor Med. Juris. (Encyl.) 629.
Hays Med. Juris., Sec. 77.
Combe on Mental Derangement (Am. ed.) 96, who says that authors who differ on all other points agree on this.

In the case of Coughlin *vs.* Pulson, 2 McArth., D. C., 308, it was held competent to prove, in a case involving capacity to make a will, that the testator's relatives were insane.

We do not believe this proposition of law will be denied, for the evidence was admitted without objection, and the effect of the court's refusing to instruct the jury on that part of the evidence was to exclude it from consideration of the jury.

Reichenback *vs.* Reichenback, 127 Pa., 546, 589, holds that where insanity is shown a short time before will is made, burden should be placed upon proponent; and see Beaver *vs.* Springler, 93 Iowa.

In a will of real property the witnesses should not be absolute strangers to testator.

Swenmartin *vs.* Hancock, 6 Abb., N. C., N. Y., 266.

And further the cutting out of the remaining part of the prayer was improper.

It was shown by the evidence in the case that both of the subscribing witnesses to the alleged will were total strangers to Thomson; that only one of them had ever seen him before, and the other had seen him but on one occasion previously; under such circumstances there could have been no impropriety in the court calling the attention of the jury to the fact, as the law does not give

the evidence of such witnesses the same weight it would have given had they known the testator better.

Underhill on Wills, vol. 1, 117–118, note 2.

> "The opinion of a witness who is a stranger to testator and who sees or hears nothing except what is necessary to enable him to attest the instrument, is not as much to be relied upon as that of a neighbor and familiar acquaintance of the testator."

Garrison *vs.* Garrison, 15 N. J. Eq., 266.
Green *vs.* State, 88 Tenn., 614.

> "If subscribing witness is a stranger and has no opportunity to ascertain and judge of testator's capacity, his opinion is not entitled to as much weight as that of a friend who saw testator about same time and who was offered opportunity of conversing with him and testing the sanity of his mind."

Furner *vs.* Cheasman, 2 McCart., N. J., 243.
Garrison *vs.* Garrison, *supra.*
Hodge *vs.* Fisher, *supra.*

Nineteenth Assignment.

This assignment of error is based upon the refusal of the court to give the plaintiffs' sixth prayer of instruction.

The testimonian clause of the paper offered by the defendants and purporting to be a copy of the will of said Thomson, is in the following words:

> "In witness whereof, I, the said William Thomson, have to this my last will and testament, contained in two sheets of paper, *and to each sheet thereof, set my hand and seal this 24th day of February, 1886.*" (Rec., p. 25.)

And Lomer, one of the alleged subscribing witnesses, says—

> "the signature appeared twice upon same, namely, *at the foot of the first page and at the end of the will, on the second page.*"

Now, the question is, was it not incumbent upon the proponent of the will to show why this signature is not to be found upon the paper produced? It will be seen by the paper offered, if the first page of same was written on ordinary legal cap, it would contain the most vital part of the bequests, and it would have been a very easy matter to separate the two pages and insert any matter that was desired in place thereof. At least two-thirds of the contents must have been placed upon the first page.

> "If, on production of instrument, it appears to have been altered, it is incumbent upon the party offering it to explain its appearance."

Greenleaf on Ev., 16 ed. Sec., 564, notes 1 and 2, and Sec., 565.
Gregory *vs.* McPherson, 13 Cal., 573.
Bayres *vs.* Hamilton, 72 Ga., 568
Smith *vs.* United States, 2 Wall., 219.

> "To insure the identity of the instrument and to prevent the substitution of another without privity of the party concerned.
>
> "Courts of justice have not always adhered to that rule, but the decisions of recent date in the parent country show that her courts have returned to the old rule in all its full vigor."

Smith *vs.* United States, 2 Wall., 232.

In the case of Williams *vs.* Tyley, 1 Johnson Chancery Rep., Vice-Chancellor Sir W. Page Wood said :

> " So here the deceased having, in the witnessing clause at the end of his will, *expressly noted the circumstances of his having signed all the preceeding pages of his will, has made these signatures a part of his will ;* and having torn off the signatures from the first four pages, I hold and should have held the same, even if he had not struck his pen through the signatures of his name at the foot of the fifth and last page, that he has torn his will, within the meaning of the 20th section of the act."

Twentieth Assignment.

This assignment is based upon the court's refusal to grant the eighth prayer of the plaintiffs.

In the opening argument of the counsel for defendants it was said :

> " We expect to prove that this deed (referring to deed under which plaintiffs claimed title) lacks any consideration ; that it is the consummation of a conspiracy, and there is a title placed in some nominal individual to act as a scrapegoat of these people, who come here and try to force the old ladies out of their rights," etc. (Rec., p. 6.)

It will be noticed that the attorney for said defendants had stipulated with the defendants that the plaintiffs held 91-100 of the title of the heirs at law of said Thompson.

The plaintiffs objected to this line of statement, but the court allowed them to proceed, holding that when they were ready to offer evidence would be a proper time to dispose of the question.

No evidence whatever was offered to sustain the statement, and if it had been, it would have been entirely irrelevent and inadmissible for any purpose.

Who took the title to the property and what was the consideration for the deed in trust (Rec., p. 54) was no affair of the defendants. It did not tend to prove or disprove any issue in the case.

The plaintiffs, wishing to disabuse the mind of the jury of what had been said, requested said prayer, but the court refused to so instruct the jury. There being no evidence in the case, it was the duty of the court to give this instruction or the like in its charge; to refuse to do so was error.

> "No duty incumbent upon the judge of a trial court is more imperative nor more important to the fair and orderly administration of justice than that of interposing to restrain everything in the course of the trial that tends to mislead the jury and to direct their minds from the strict line of inquiry with which they are charged."
>
> Baltimore and Ohio R. R. *vs.* Boyd, 67 Md.. 32.
>
> "Where counsel exceeds limit allowed in argument, it is proper to ask suitable instructions to the jury with reference to it."
>
> Thomson on Trials, Sec. 957.
> Leonard *vs.* Hall, 133 Mass., 417.
> Jackson *vs.* State, 18 Tex. App., 586.
> N. Y. Life Ins. Co. *vs.* Baker, 94 U. S., 611.

The plaintiff asked for such instruction and it was refused:

"Where there is no evidence tending to prove a particular fact, the court is bound so to instruct the jury."

Greenleaf *vs.* Birth, 9 Pet. 292, appeal from the Circuit Court, D. C.

The judgment of the court below should be reversed and a new trial awarded.

Respectfully submitted,

HUGH T. TAGGART,
C. C. COLE and
LEO SIMMONS,
Attys. for Plaintiffs in Error.

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SUPREME COURT

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELEY, TRUSTEE, AND RICHARD K. PAYNTER

vs.

JOSEPH H. MOORE, *Et Al.*

Motion for Rehearing and Brief in Support.

H. T. TAGGART,
C. C. COLE,
LEO SIMMONS,
Attorneys for Plaintiffs in Error.

PRESS OF BYRON S. ADAMS.

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MOTION FOR REHEARING AND BRIEF IN SUPPORT.

Now come the plaintiffs in error and move the Court to grant them a rehearing in this case, for the reasons set forth in the brief in support of the motion herewith filed.

H. T. TAGGART,
C. C. COLE,
LEO SIMMONS,
Attorneys for Plaintiffs in Error.

ARGUMENT.

This case contains twenty assignments of error, all of which seems to us well supported by good authorities, and we feel constrained to call attention to some of them and to some facts shown in the record, which we believe were overlooked by the Court.

This first is in relation to the admissability of the evidence given by witnesses for the defendants in relation to the fact of a will of William Thomson being on file in the English court, and is treated under the first and second assignments of error; pages 29 to 35 of the plaintiff's brief.

Mr. Pritchard, one of said witnesses, said, Rec., p. 19, "the original will of William Thomson has been duly proved in form of law and the probate of it would be accepted as evidence of a will in all courts of justice in this country."

Several of the other witnesses made similar remarks. There is no issue in this case that this statement tended to prove. The answer was objected to and an exception noted to same, record, p. 18. It cannot be said that a statement made to a jury, that the paper would be accepted as evidence of a will in all courts of justice in the country where it was made did not prejudice the rights of the party objecting. Would not any layman from the fact that a "will had been duly proved in form of law, and that the probate of it would be accepted in all courts of justice" in another country conclude that it should be good in any place?

It must appear that this evidence did not and could not, beyond doubt, have prejudiced the rights of the party objecting.

Boston and Albany R. R. Co. v. *O'Rielly,* 158 U. S., 334, cited on p. 32 of brief for plaintiffs in error.

The whole of the evidence taken in relation to the will being on file in England is of similar prejudicial character, and the cases cited clearly maintain the proposition that it was error to admit this evidence; we ask a careful review of this part of the case. Brief, pp. 29 to 37.

The next question arises under the sixth assignment. brief, p. 38. To hold that the paper purporting to be a copy of the will of Thomson, Rec., p. 26, was admissible in evidence without any showing whatever that the original or duplicate could not be produced would seem to be in contravention to all the authorities on the subject relating to the admissibility of secondary evidence.

If the original paper or the duplicate could not be produced, it cannot be said that the defendants were not required to show that to be the fact, by some evidence, as was said in the case of *Robertson* v. *Pickerel,* cited on p. 34 of the brief. Some reason should be given for its non-production.

In *Owens* v. *Hull,* 9 Pet., 606, the case was as to the admissibility of a copy of a bill of sale of certain slaves. The Court said:

> "The next objection was that the copy of the original bill of sale of the slaves to Hull on record in the notary's office was not evidence, unless the plaintiff accounts for the non-production of the original. The validity of this objection depends upon the consideration whether the non-production of the original was sufficiently accounted for. It was not accounted for by any proof offered on behalf of the plaintiff, and unless the Circuit Court could judicially take notice of the laws of Louisiana there was nothing before the Court to enable it to say that the non-production of the orginal was accounted for. We are of the opinion that the Circuit Court was bound to judicially take notice of the law of Louisiana."

> The Court held that because said law prohibited the removal of the original from the office where it was filed the copy could be used in evidence as the best evidence obtainable.

There is no evidence whatever in this case to meet this requirement, and the Court cannot take judicial notice of the law of England, even if there was any law prohibiting the taking away of original papers.

The question as to the duplicates is treated fully under the sixth assignment; pp. 38, 39, 40 and 41 of brief. We believe that this is the first time that this Court has held that a copy of a paper of the character mentioned (namely, one that takes effect as a deed) could be admitted without some evidence tending to show that the original or the duplicate original could not be produced. Furthermore, it appears that the duplicates are to be taken together as constituting the will. The cases cited on pages 41 and 42 of the brief are clear to the point that both papers should have been produced or properly accounted for. If either of these papers had been produced, the place of the certificate would have appeared, and it would have been shown that it had no relation to the attestation of the instrument.

The next matter to which we desire to call the Court's attention has relation to one of the instructions given on behalf of the defendants in the case. It is said by this Court in its opinion, p. 3, referring to the certificate of Cooksey:

> "That the jury might properly draw the conclusion that it (the certificate) was signed in the testator's presence."

By this, the Court evidently means no more than that the submission of the certificate to the jury as a fact or circumstances tending to support such conclusion would have been proper.

But the fact is, the case was not left to the jury to draw the conclusion. The trial Court, by the defendant's third prayer, Rec., p. 56; see brief, p. 20, instructed the jury as follows:

> "The jury are instructed as a matter of law that the introduction of the will in this case by the defendants, and the testimony accompanying same, constitute *prima facie* evidence that the said will was signed by Thomson and duly attested to pass real estate in the District of Columbia."

There was no evidence in the case whatever other than the bare finding of Cooksey's signature on the certificate to support it as an attestation and to satisfy the fundamental statutory requirement of a signature in the presence of the testator; and at all events it was the province of the jury to find whether or not the staute had been complied with in this respect.

Clark v. *Turton*, 11 Ves. Jr., and cases cited in the brief, pp. 45 to 52, are conclusive to the point that the certificate in this case did not constitute *prima facie evidence.*

By this instruction the Court did not leave it open to the jury to find from inference by presumption or in any other way that Cooksey did not sign the certificate in the presence of the testator. The Court decided the question of fact for the jury; and if there had been no other issue in the case, and the jury had returned a verdict for the plaintiff, would not the Court, if this instruction was proper, have been bound to set aside the verdict as contrary to it.

The converse of the proposition must be true. If this instruction was improper and the jury found in accordance with it, the verdict should be set aside.

The next question we desire to call the Court's attention to is to the instruction given by the fourth, sixth and seventh prayers of the defendants, Rec., p. 57; brief, pp. 75 to 89, and coming under the fifteenth, sixteenth and seventeenth assignments.

By composition of parts of prayers four, six and seven granted on behalf of the defendants the injury will plainly appear, when considered in connection with the evidence applicable to them.

> (Prayer fourth.) "In the District of Columbia the capacity of a person to make a valid deed or contract is the test of capacity to make a valid will." (Prayer sixth.) *"The jury are instructed as a matter of law that the testamentary capacity of William Thomson need only have existed at the time of making the will in question."* (Prayer seventh.) "The jury are further instructed that there is no evidence in this case of any opinion of any non-expert witness that William Thomson was, at the time he made said will incapable of making a valid deed or contract; nor is there any statement of any non-expert witness as to the mental incapacity of William Thomson to make a valid deed or contract at the time said will was executed."

The Court will bear in mind that by the third section of the Act of Md., 1798, referred to on page 2 of the opinion, it is made a condition precedent to the valid execution of a will that a *testator shall be of sound disposing mind.*

The will was executed, it was contended, on the 24th

and 25th of February, 1886. This Court in its opinion, p. 6, finds there was evidence of insanity during the month of February. The witnesses for the plaintiff did not say in express words that the man was incompetent to make a will. They were not asked such question. It was their duty to state the facts and allow the jury to draw the conclusion as to the testator's competency to make a will. It is certainly no reason for holding that there was not evidence in the case tending to show the testator was mentally incompetent to make a will at the time the will was executed, because no one says so in express words. If I say a man came to my house, entered the door and took away my coat, I do not say, in express words, he is a thief, but I undoubtedly charge him with the act of stealing, and in effect say that he is a thief. *One witness in this case said in express words that she "thought" Thomson was just as insane after his return from the asylum as before he was taken there, if not worse.* In view of this testimony of Annie Lowman how can it be properly said that there was no evidence of an opinion by any non-expert witness that the testator was incompetent at the time of making the will, to execute a valid deed or contract? Hiscock testified to such a condition of facts in the testator's behavior before and during the entire month in which the will was executed, as of necessity involved such an opinion on his part.

The Court says in the opinion, p. 6, that he was undoubtedly insane at the time of his admittance to the asylum, and from which he was paroled in charge of an attendant on February 1, 1886. Annie Lowman, one of his domestic servants, who remained with him during February and part of the month of March, Rec., p. 28, says:

> "That from what she saw of him she thought he was just as insane as before he went to the asylum, if not worse."

Hiscock, his clerk for six years, testified, Rec., p. 30, that after his return from the asylum he never appeared to be in his normal condition again, mentally or physically.

Furthermore, Annie Lowaman testified, Rec., p. 29, that Cunningham, who, with his children, are the principal beneficiaries under the will, was not at Thomson's house "until after his return from the asylum; after that he spent most of his time there, sleeping elsewhere at night."

If Thomson was sane and capable of managing his affairs, what occasion was there for this man's constant presence at the testator's house?

In view of this was it proper for the Court to say to the jury that there was no evidence of any opinion of any non-expert witness of the mental incapacity of Thomson at the time of making the will? Might not the jury have taken this as the equivalent of a statement to them, that there was no evidence in the case tending to show insanity or incompetency on the part of Thomson at the time of executing the will?

This Court has said that a trial court has no right even to call the attention of the jury to weak points in the evidence, and certainly if it has no right to call the jury's attention to a weak point in the case, it has no right to say there is no evidence when in fact there is. (See brief, pp. 82 to 86.)

It is said by this Court in its opinion that the evidence of insanity was quite unsatisfactory; page 5: and at p. 6 that the evidence of insanity was very slight. We desire to call the Court's attention to some particular parts of the evidence on this question. It is shown by the evidence of William Weir, Jr., Rec., p. 42, that about the 1st of October, 1885, it was discovered that Thomson was insane.

> "He wanted to go out in the street without any clothing on; he took up hot coals of fire with his bare

hands. He blew out a candle and took it in his mouth and sucked it like a child. He would get up and dress and in about three minutes would undress again. He would walk about the drawing room and bow and say good evening and good morning when there was no one there. He stuffed his clothing with paper and tried to set them on fire. He threw ornaments from the mantel through the windows. That they had to put his food in his mouth when he ate. That they had to have a regular attendant for him," etc.

Annie Lowman, his servant, Rec., p. 26, testified to similar acts, and that she was afraid of the man; that he acted generally like a madman.

The witness Hiscock, Rec., p. 29, testified to similar acts. While in the asylum he wrote letters, Rec., p. 39, and dated them in 1869, while the time the same were written was in 1886. He wrote to young Weir for tobacco, which he had never used before. Dr. Manning says, Rec., p. 36, he imagined while at the asylum he was in New York, and that people he never saw before were his intimate friends. By this alleged will he failed to make provision, as he had in his former will, for bringing his body to this country for burial. Weir, Sr., Ev. (Rec., p. 49), his father and mother were insane before him. Weir, Sr., and Jr. Ev.

Such actions as these can leave no doubt of Thomson's insanity at the time of his commitment to the asylum, and the testimony of Lowman and Hiscock above mentioned is to the effect that it continued during the month of February, 1886.

This Court says the man was discharged as probably cured. Dr. Manning says in his deposition, Rec., p. 36, the man was suffering from Bright's Disease.

> "I am of the opinion that the mania was the result of weakness following disease of the kidneys and old age." (Rec., p. 37.)

This, it would seem, corroborates Lowman's and Hiscock's evidence: neither Bright's disease nor old age are curable.

As against this positive proof of insanity we have the deposition of Mr. Lomer, admitted to be an attorney for the defendants in error; Mr. Linthorne, his clerk, and the bare statement of the witness Cooksey, who said, Rec., p. 16, that he recollected the time in February, 1886, when Mr. Thomson came to see his father.

> "And I say at that time, so far as I could judge, Mr. Thomson was perfectly sane and in good health."

Mr. Lomer says he never met the man until about the 15th of February, 1886. Mr. Linthorne never saw him until the 24th, the day the alleged will was executed. Two of these three witnesses were entire strangers to the testator, and the third did not pretend to testify to anything positive, a mere guess on his part; while the witnesses for the plaintiffs, on the other hand, had known him for years, and gave acts and doings clearly showing a mentally unbalanced mind.

They had ample opportunity to judge of his condition, while the others had only slight. In this condition of the proof, was it not wholly unwarranted on the part of the trial Court to say, as was in effect done by it, that there was no evidence of mental incapacity at the very time this will was executed?

Would any person have purchased the property in question of Thomson at the time the alleged will was dated, and paid for same knowing his condition?

Where will there be another case found of a man who had made a will while in good health, and later gets out of

an insane asylum and rushes to a lawyer's office, so to speak, to make another wholly different one?

The next matter which we deem worthy of consideration by the Court has relation to the Cooksey certificate. The Court says, p. 5 of opinion:

> "If the certificate was an official act and material as a separate acknowledgment of the execution of the will, as an acknowledgment of a deed, the case will be different since it has never been supposed that a notary who takes an acknowledgment of a deed could be counted as a witness to the deed without a separate signature. But here the certificate was an wholly unofficial act, and we see no objection to disregarding the words 'Vice-Consul of the United States' and treating it as an acknowledgment of the execution before a competent witness."

On page 3 the Court says:

> "But as it appears that Thomson not knowing when he would be in London, took the certificate to the 'Vice-Consul,' and that the latter signed it, the jury might properly draw the conclusion that it was signed in testator's presence. This would be the usual course of business, and the presumption is that Cooksey conformed to it and to his duty as a certifying officer."

Does the Court not hold thereby that the man was acting as an official, and that the act was an official act? And on the next page that the man was not acting officially, and that his act was not an official act? One or the other must be wrong. And does not the Court hold that the same presumption applies to either case as to facts not appearing in the certificate. What did the testator intend to do when he

first conceived the idea in his clouded brain that a certificate was necessary. His intention will show whether or not we can disregard the words "Vice-Consul of the United States." It must be borne in mind that Thomson had previously made a will, in his own handwriting, disposing of all his possessions, wholly different from this, and it had but two witnesses to it. (Weir, Sr., Ev.; Rec., p. 49; and see also Weir, Jr., Ev., Rec., p. 48.)

The testator spoke of getting the highest official representing the United States in England to perform the act of making the certificate, notwithstanding a third witness was at hand, if he wanted one. (Lomer's Ev.) He did not go to London, but saw the Vice-Consul and arranged with him to perform the act. The next day he proceeded to have the attorney prepare the certificate, using strictly an official form; still a third witness was present if he wanted one. After having the form of the certificate written he went or sent it to the Vice-Consul to be signed, to a person whom he expected to act in an official capacity, and to use the consulate seal in so doing.

The body of the certificate was written by Lomer, and not by Cooksey; the only function to be performed by the latter in connection with it was to sign it in his official capacity and attach the Consulate seal. This gratified to the fullest extent the understanding of all parties, and Thomson's presence was wholly unnecessary.

If Thomson was not present, the will is void; the certificate is silent on the point and there is no evidence *ali-unde* that he did in fact sign in Thomson's presence.

The evidence in this case is conclusive that nothing more than an official act was intended, and any other interpretation would be wholly in disregard, both of what Cooksey and Thomson meant to do.

The sole intention of the testator was to obtain an official certificate, and the ultimate purpose of it is wholly immaterial; all of the testimony is at variance with the idea that he was seeking a third attesting witness.

The law in relation to descents, which has been known and recognized since the beginning of the judicial system in England and the United States, always places the presumption in favor of the heir at law, and in order to remove this presumption a person who claims under a will must remove every doubt as to its valid execution

> "The heir at law may rest safely upon the presumption that the estate is cast upon him until this is done."

See Tyler on Ejectment, and other authorities cited on page 74 of plaintiff's brief.

The plaintiffs offered to show that it was a customary thing at the Consulate in question to execute certificates when the party to whom they were given was not present; and the Court refused to admit this evidence. (Rec., pp. 45, 46 and 47.; see 12th Assignment, brief, p. 64.)

And further, can it be said that when a man signs his will on each page, that a paper purporting to be a copy which does not contain both of such signatures is a copy. Which signature did Cooksey certify to—the one on first page or the one at the foot of the will? Can it be said that one is not just as important as the other? (See 19th Assignment, brief, p. 90.)

See also refusal to grant plaintiff's 8th prayer, 20th assignment, brief, p. 92.

A trial court should not give an instruction for the parties on one side, to the effect that there is no evidence on a

particular point, when there is such evidence: and refuse to give an instruction for the parties on the other side, that there is no evidence to support a charge or an assertion made to the jury by counsel, when there is no such evidence.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELY, TRUSTEE, AND RICHARD K. PAYNTER, PLAINTIFFS IN ERROR,

vs.

JOSEPH H. MOORE; EDWARD J. STELLWAGEN AND THOMAS M. GALE, TRADING AS THOMAS J. FISHER AND COMPANY; MARY CECILIA THOMSON, AND GEORGIANA HAWKES THOMSON, DEFENDANTS IN ERROR.

Brief on Behalf of Defendants in Error.

Statement of Case.

This is an action of ejectment brought by Andrew C. Keely, styling himself as "trustee," and Richard K. Paynter to recover ninety-one one-hundreths of a part of a certain lot in the city of Washington, District of Columbia. The original defendants were the real estate agents and the party in possession. Mary Cecilia Thomson and her sister were made defendants upon motion, they being the life tenants under the will of William Thomson, jr. The plaintiffs are strangers to the blood of William Thomson, they having obtained a pretended title to the property by deed made the 22d day of March, 1899, by certain persons claiming to be

heirs of William Thomson, Jr. The deed recites that William Thomson, Jr., *died intestate as to the hereinafter described real estate.* The plea of "Not Guilty" having been filed and issue joined, the case came on for trial. By a stipulation it was admitted that William Thomson died in the year of 1887, seized of the property involved in the suit, and that the grantors in the deed mentioned were some of the heirs of William Thomson, and that the parties in possession were in possession under the will of William Thomson.

Thereupon the plaintiffs rested.

The defendants, in order to prove their case, the original will of William Thomson being of record in the Probate, Divorce, and Admiralty Division of the High Court of Justice, London, England, not being able to produce it in court, took certain depositions, the substance of which will be considered in the argument. After reading the depositions and producing not only a certified but an examined copy of the will, which had been compared by the witnesses who testified, and also by two of the subscribing witnesses to the will, and upon proof of the due execution of the will by two witnesses and proof of the death of the other subscribing witness and proof of his handwriting, the court admitted the will in evidence. The plaintiffs' attorney objected, and their objections are set out at large on page 26 of the printed record. Testimony was taken in rebuttal and surrebuttal as to the testamentary capacity of William Thomson at the time that he made the will. It was also claimed that there was certain testimony to show undue influence. The plaintiffs in the trial court also offered in evidence a copy of the will of William Thomson, Jr. (Rec. p. 49). As the record does not purport to contain all of the testimony in the case, it is not necessary for us to consider the testimony except in so far as plaintiffs' exceptions go to the ruling of the court as to admissibility of certain testimony which appears in the record. After

the testimony was in certain prayers were granted for the defendants and for the plaintiffs, and some of the plaintiffs' prayers were refused. The record on page 61 shows certain exceptions taken by the plaintiffs to the refusal of the granting of certain prayers offered by them. The record also shows, on page 56, plaintiffs objected to the granting of certain prayers which were granted by the court on behalf of the defendants. The record fails to show the reason why the plaintiffs excepted to any ruling of the court upon the evidence, except to the admission of the will in evidence, or to any of the defendants' prayers, and it also fails to show any reason why an exception was noted to the ruling of the court in refusing any of the prayers offered on behalf of the plaintiffs.

Thereupon the court charged the jury at length, and when the court had delivered its charge and before the jury retired, plaintiffs' counsel stated to the court *that they had no exceptions to the charge.* The jury thereupon retired and returned a verdict for the defendants.

The plaintiffs thereupon filed a motion for a new trial, the motion being set out on pages 73 and 74 of the record. Pages 73 to 130 of the record embrace proceedings had in the trial court on the motion for a new trial. Judgment having been entered on the verdict, the plaintiffs appealed to the Court of Appeals of the District of Columbia, and that court, on the 6th day of May, A. D. 1903, affirmed the judgment of trial court and plaintiffs then sued out a writ of error to this court.

ARGUMENT.

Before taking up and considering the questions of law involved in this case, we will briefly refer to the facts as contained in the record.

The plaintiffs in error appear to be land speculators attempting to get possession of a valuable piece of property

that was devised to Mary Cecilia Thomson and Georgiana Hawkes Thomson, the nearest living blood relations of the devisor, William Thomson, jr. In the deed under which plaintiffs claim title one of them is called "trustee" and the other one takes title in his own right, and the property is conveyed to them by certain heirs of William Thomson, jr., for the sum of $10. From this deed it would appear that the attack made upon the mental capacity of William Thomson, jr., to make his will, as well as the undue influence pretended to be set up in the record, *was an afterthought, as the deed recites not that William Thomson died testate, but that he died intestate as to the particular piece of property in the District of Columbia,* and the record shows that some of the grantors, or the ancestors of the grantors, received large sums of money under this very will. The record, as before stated, does not disclose all of the testimony in the case, but from what little appears in the record it is apparent that these two speculators are trying to defeat the will of William Thomson, jr. From this it would appear that these plaintiffs are entitled to no more favorable consideration of their case in this court than it is absolutely necessary under the law to give to them, for they have no equity in their apparent title.

In considering the questions of law that are raised by the plaintiffs in error, instead of considering each assignment of error as plaintiff has set them out, we will first take up and consider the assignments of error and exceptions taken to that part of the testimony which was given for the purpose of proving a proper execution of the will of William Thomson, and in doing that it will be necessary for us to consider the exceptions taken to the admission of this will in evidence; as well as those assignments of error and exceptions which are taken to certain portions of the depositions of the witnesses produced on behalf of the defendants, and then we shall take up and consider those assignments of error which refer to the exceptions noted to the ruling of

the court on certain testimony offered on behalf of the plaintiffs in error in rebuttal; and lastly, we shall consider those assignments of error that relate to the ruling of the court on the granting or refusal of certain prayers.

1. The assignments of error and exceptions taken to the ruling of the court on the evidence offered by the defendants in error to prove the due execution and contents of the will of William Thomson, and the exception taken to the admission of the will in evidence.

In considering this proposition we will cover the first six errors assigned by the plaintiffs in error in their brief. An examination of the record will show that all of the testimony contained in the record from pages 7 to 26 was offered for the sole purpose of proving that William Thomson died testate as to the part of his property situated in the District of Columbia; the original will itself, as before stated, was of record in England and could not be produced. From the testimony it would appear that the will was executed in duplicate, but that there was no evidence to show where the other copy was other than that it had been sent, after the death of William Thomson, to New York. The first thing that confronted the defendants in error was, how to prove the original will of William Thomson and have before the court sufficient evidence to show not only its *due execution*, but also its contents.

Following the decision of this court in the leading case of Robertson *vs.* Pickerel, 109 U. S., page 608, depositions were taken in England, not only of all of the living witnesses to the will, but of the person who had, at the time the depositions were taken, the custody of the original will, as well as proof of the handwriting of the deceased witness. And not only was a certified copy of the will attached to the depositions, but that copy was compared with the original on file in England by the witnesses to the will as well as the the custodian of the will; and appellees went a step further and had photographed the disputed certificate which

appeared on the second page of the will of William Thomson, and which is fully set out in the record, page 26, and which is fully identified and referred to in the testimony on pages 18 and 19 of record. By the Statute of Victoria only two witnesses were necessary for a will in England, and these witnesses must sign, not only in the presence of the testator, but in the *presence of each other*, and therefore, in the original probate of the will the certificate of John H. Cooksey, the third witness, was omitted therefrom, because not only was it not necessary to have such witness under the law of of England, but on account of the further reason that, according to the testimony, Cooksey did not subscribe as a witness in the presence of the other two, the other two subscribing on the 24th day of February, 1886, and Cooksey attaching his signature thereto on the 25th day of February, 1886.

Before the hearing of this cause in the Court of Appeals, counsel for the defendants in error were furnished with a copy of the assignment of errors used by the plaintiffs in error in that court, which assignment of errors was the same as the assignment in this court, but counsel were at a loss to know upon what grounds the plaintiffs in error excepted to the questions and answers contained in the depositions of Pritchard, Parker, Venn and Lyte. No reason for the exceptions is stated in the record and counsel were surprised when, examining the brief of the plaintiffs in error in the Court of Appeals, they discovered that plaintiffs were going to contend that the will which appears on page 24 of the record and the certificate attached thereto, contained on page 26 of the record, were not the will and certificate referred to in the depositions of the witnesses taken in London for the sole purpose of proving the will and the certificate thereto. This contention was based upon the fact that the bill of exceptions did not refer to these two papers as the exhibits mentioned in the depositions, and counsel, in considering the assignment of errors, attempted

to have the Court of Appeals believe that these two papers as well as "J. D. V. No. 3" crept into the record as independent evidence and had nothing whatever to do with the depositions. Counsel for the defendants in error immediately upon discovering the action of counsel who represented the appellants in the Court of Appeals, believing that an attempted fraud was about to be perpetrated upon the court on account of the fact that these two papers were not designated as the exhibits referred to in the depositions, immediately applied to the court below and showed to that court what the plaintiffs were attempting to do in the Court of Appeals of the District of Columbia. The Justice of the Supreme Court of the District of Columbia thereupon signed an order designating the several papers as the exhibits referred to in the several depositions, and corrected the bill of exceptions as prayed for in the motion of the defendants in error. Thereupon defendants in error applied to the Court of Appeals for the writ of certiorari to bring that record before them, but the Court of Appeals, in the case of Keely et al. *vs.* Moore et al., 22 App. D. C., page 1, held that they had no authority to grant the writ of certiorari, and the case was heard by the Court of Appeals upon the same record that we have here before this court. All of the testimony of the witnesses heretofore named was objected to in the Court of Appeals on the sole ground that the two papers here referred to were not the ones offered in evidence, and therefore the testimony was immaterial and irrelevant. No such objection appears in the record, nor does any such objection appear when counsel objected to the introduction of the papers. An examination of the record will show that the depositions fully identify the will offered in evidence, as well as fully identifying the certificate on page 26. In fact, on pages 18 and 19 of the record, Robert Albion Pritchard not only identifies the exhibits, but *reads in full the certificate made by Cooksey, which he says was annexed to the will of William*

Thomson. As far as the will itself is concerned, not only was it fully identified by all the witnesses who were examined in regard to its proper identification, but it was compared, according to the testimony of all the witnesses, with the original will of William Thomson on file in the English court, and on page 49 of the record the plaintiffs in error themselves offered in evidence a copy of the will of William Thomson, which copy is exactly the same as the copy offered in evidence by the defendants in error, except in this, that there was not added thereto the certificate of Cooksey, which was photographed by the defendants in error, and it is also certified to by a registrar. Defendants in error therefore contend that this court will hardly permit the plaintiffs in error to impose upon them in contending that the will and photographed copy referred to in the depositions was not the will and certificate that was offered in evidence, and which appear in the record.

The justice who tried the case as shown in the case of Keely *vs.* Moore, heretofore referred to, identifies these papers as the ones referred to in the depositions, and the Court of Appeals treated this contention of plaintiffs in error as untrue, for in their statement of the case, which will be found on page 136 of the record, they say:

> "The defendants thereupon proceeded to prove the will of William Thomson. The original, probated in London and retained in the registry of the court there, *was not available to be produced upon this trial;* and recourse was had to secondary proof of its execution and contents. Two of the witnesses, Lomer and Linthorne, were yet living and their testimony was taken by deposition. It is sufficient to say, in regard to this testimony, that the witnesses testified fully and unequivocally to the due execution of the will in their presence and their attestation of it, and to the mental capacity of William Thomson at the time to make it. Lomer and Linthorne also testified to the writing of the added certificate in their office. John H. Cooksey, the vice-consul, had died in 1895;

but his son, who was examined as a witness by deposition, testified to the genuineness of his father's signature attached to the certificate. He also testified that he knew William Thomson well; and, that in February of 1886, when Thomson came to see his father about the will, he was perfectly sane and in good health.

"The contents of the certificate attached to the will were stated by one of the registers of the probate office who had the custody of it, and were set forth in his deposition verbatim from the original paper. A photographic copy of it was also proved by him and others, and was admitted in evidence, although objected to by the plaintiffs. This same witness also testified to the correctness of a certified copy of the will and which was annexed to the interrogatories propounded to him, marked "J. D. V. 2," and he stated that he had compared it with the original will and that it was correct, word for word, and in every particular. And this paper also was admitted and read in evidence over the objection of the plaintiffs. An identically similar copy was subsequently introduced in evidence by the plaintiffs themselves in rebuttal. This was substantially the case made for themselves by the defendants."

We will now take up each witness and consider his testimony in order.

Robert Albion Pritchard, a witness whose testimony is objected to, was, at the time that he testified, one of the registrars of the Probate, Divorce, and Admiralty Division of the High Court of Justice, England, and a doctor of the civil law, residing at Somerset House, Strand, London, England. The duties of his office were not only to have the custody of wills, but also to examine and certify to wills as one of the registrars; and he testified that there was a paper on file purporting to be the will of William Thomson, which paper had been probated in that court and was of record therein. He then identified the photographed copy of the attestation clause signed by Cooksey, and also identified the certified

copy of the will which accompanied the depositions, and which was the copy that was offered in evidence, and he stated that he compared it with the original will, and that it was correct, word for word, in every particular.

William G. Parker, whose testimony is objected to, testified that he was a photographer, residing in London, England, and that he photographed the exhibit which was offered in evidence, and he said that it was a facsimile copy of the certificate as it appears on the original will of Wm. Thomson, jr., and that the photograph was made by him; that the will was brought to his office by Mr. John Venn, accompanied by an officer of the High Court of Justice, and that it was there photographed by him.

John Dalton Venn, whose testimony is objected to, testified that he was present when the photograph of the attestation clause signed by Cooksey was made by the photographer, and he identified the exhibit as being a true copy of the original.

William Maxwell Lyte testified that he is a churl servant, employed as clerk in the Probate Registry, Somerset House, and that he took the original will of William Thomson, bearing date February 26, 1886, to the photographer's, Mr. Parker's, and there the same was photographed, and he identified the exhibit which appears on page 23 of the record.

After these interrogatories were read, the defendants offered in evidence the will of William Thomson, together with the photographed copy of the certificate of Cooksey, which will appears on pages 24 to 26 of the record, and plaintiffs objected, stating, on page 26 of the record, certain specific objections to the offering of the will in evidence. The trial court admitted the will as prima facie evidence of the fact that William Thomson devised the property mentioned in the declaration in ejectment, but when the case was finally submitted to the jury the question of whether or

not the will was duly executed was left to the jury to decide.

We will therefore consider whether or not the trial court was warranted, on the testimony here produced, in admitting the certified and examined copy of the will of William Thomson, after its proof as set out in the interrogatories, in evidence against the specific objections set up by plaintiffs, and that brings us to consider the question of the manner of proving a will in this District. In taking the testimony as they did, counsel were guided in a great measure by the decisions of this court. In the case of Robertson *vs.* Pickerel, before referred to, the Supreme Court of the United States, in considering the will in that case, which was on file in a court of record in Virginia, say:

> "The question still remains—is the instrument sufficient to pass title to real property in the District of Columbia? If so, it should have been produced and proved in the manner mentioned. If, as stated by counsel, it is on file in the Hustings Court, and by the law of Virginia can not be removed, then it should have been proved under a commission as other instruments out of the city are proved when it is impossible to compel their production in court."

On the question of submitting secondary evidence it would seem that under the decisions of the Supreme Court of the United States proof of written instruments being outside of the jurisdiction of the court would be sufficient to warrant secondary evidence of their contents. In the case of Burton *vs.* Driggs, 20 Wallace, p. 134, the Supreme Court, speaking of this question, say:

> "In the present case the witness lived in one State and more than 100 miles from the place of trial. The process of the court could not reach him. For all jurisdictional purposes he was as if he were dead. It is well settled that if books or papers necessary as evidence in a court in one State be in the possession of a person living in another State, secondary evi-

dence, without further showing, may be given to prove the contents of such papers, and notice to produce them is unnecessary."

See, also—

Shepherd *vs.* Giddings, 22 Conn. 282.
Brown *vs.* Wood, 19 Mo. 475.
Whilden *vs.* Merchant Company, 64 Ala. 30.
Binney *vs.* Russell, 109 Mass. 56.

Thus, it is well settled, that in order to prove title to real property the will must be produced in court and evidence given of its due execution; but if the will be lost or can not be produced, the proof must be made by secondary evidence of its execution and contents. Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declaration of the testator as to its character, *and if dead, their handwriting must be proved.*

Robertson *vs.* Pickerel, 109 U. S. 608.
McCormick *vs.* Sullivant, 10 Wheat. 192.
Darby *vs.* Mayer, 10 Wheat. 465.

It is a well-settled principle of law that a will may be proved by a certified copy, provided that you give in evidence some testimony of its due execution, or show that it is impossible to prove that fact.

Hall *vs.* Giddings, 2 Har. & J. 112.
Smith *vs.* Steele, 1 Har. & McH. 419.

The principal objection made to the admission of the will in evidence in the trial court was that it was not properly executed to pass real estate under our law; that the certificate of Cooksey was not a sufficient attestation of the instrument within our law. Upon an examination of the authorities it will be found that under the Statute of Frauds no attestation clause is necessary in order to

establish the fact that the witnesses signed in the presence of each other. All the Statute of Frauds requires is that the witnesses should be present as witnesses and see the will signed by the testator, and that it should be subscribed by them in the presence of the testator, and they should subscribe their names upon the will in his presence, but that it is not necessary that the witnesses should sign in the presence of each other. This was settled in our jurisdiction in the case of In re Porter Will, 20 D. C. 493, and is supported by the following authorities:

Roberts *vs.* Phillips, 4 Ellis & Blackburn, 451.
Welty *vs.* Welty, 8 Md. 15.

But it is said that, notwithstanding this fact, there is no evidence that William Thomson, Jr., was present when John H. Cooksey signed the attestation clause that appears on the second page of the will as signed by him. This clause is as follows:

> "I hereby certify that William Thomson, counsel at Southampton for the United States of America, attended before me this 25th day of February, 1886, and acknowledged the foregoing paper writing, contained in two sheets of paper, as his last will and testament, and that the signature of William Thomson at the foot thereof is in the proper handwriting of the said William Thomson.
>
> "(Signed) JOHN H. COOKSEY."

If this attestation clause had also stated "and that the witness signed in the presence of Thomson," then the contention of the plaintiffs in error would fall. But what law is there that requires an attestation clause, or what law is there that required John H. Cooksey to say that he signed his name in the presence of William Thomson? Counsel for the plaintiffs in error fail to cite any authorities to sustain any such contention; but begging the question, as it were, they said: "You have not proved that Cooksey signed it in

the presence of Thomson." Our answer to that was that Cooksey is dead, and that by proof of his handwriting on the attestation clause the law presumes that he signed it as the law required. The only case cited by plaintiffs in error on this question was the case in 2d Harrington, where the will was made in another jurisdiction which required less formalities than in the State of Delaware. The court held in that case that, under those circumstances, it would be necessary to produce the witnesses and prove the due execution of the will according to the law of the State of Delaware, the devisor being a citizen of Pennsylvania and the will being made in that State to convey property in both States. William Thomson was a citizen of the United States and, until he was appointed consul at Southampton, a resident of the District of Columbia, and there is no law in England which permits a witness to sign the will out of the presence of the devisor; so that the case in 2d Harrington can be of no avail to the plaintiffs in error.

Speaking of this question of the proper proof of the attestation of a will, the Supreme Court of the United States in the case of Robertson *vs.* Pickerel, say:

> "Its genuineness must be shown by the witnesses, if they are living, who attested its execution and heard the declarations of the testator as to its character, *and if dead, their handwriting must be proved.*"

If the contention of the plaintiffs in error was sustained, it would be utterly impossible, in the District of Columbia, to prove the due attestation of a will where the will was witnessed by each witness apart from the other, unless all of the witnesses survived the devisor, for if one were to die it would be utterly impossible for the other to testify as to the execution of the will by the deceased witness. Therefore, if any such contention were sustained, it would destroy the effect and efficacy of the Statute of Frauds and would write into this statute the words "that

the witnesses must sign in the the presence of each other." A leading case on this question is that of Fry's Will, 2 R. I. 88. In that case the will was made in Virginia and witnessed by three witnesses at Norfolk, Va. It was offered for probate in the courts of the State of Rhode Island, and it appeared that all of the witnesses were dead; their handwriting was proved and objection was made to the probate of the will on the ground that there was no proof of the due execution of the will according to the requisites of the Statute of Wills, and that there was no proof that the same was signed, sealed, and declared by the testator in the presence of the witnesses, and that they subscribed their names in the presence of the testator; the court, however, saying that there can be no doubt that whatever the statute requires to make the instrument valid in law as a will must be shown in some way by proof to have been done; and the question now raised involves not so much a consideration of what facts are to be proved as the mode in which they are to be proved. Then the court says:

> "But how is this to be proved when the witnesses called to attest the facts can not be had and are beyond the power of the party to produce from death or other cause. It is well settled that in such a case secondary evidence may be given; that secondary evidence is by proof of the handwriting of the witnesses, and though there is no evidence under oath that they subscribed in the testator's presence, or he in theirs, yet in all cases where the attestation clause signed by the witnesses states the facts, the law presumes the facts were as stated though nothing is sworn to except the signatures, and thus far counsel for the appellant conceives the law to be. Proof that the witnesses subscribed is proof that they signed in the testator's presence and he in theirs, but the counsel contended that nothing more is to be presumed from the fact of subscribing than what the attestation clause states. The first case upon this point is the case of Hand *vs.* James, 2 Com. R. 571. In this case the attestation clause omitted to state the signing of

> the witnesses to have been in the testator's presence. The witnesses were all dead, and the point was made that nothing could be presumed beyond what the attestation clause asserted. But the court overruled the objection and said that the witnesses were called to attest the execution of the will and they would presume all the requisites complied with, and that proof of the signatures of the witnesses was sufficient prima facie proof to go to the jury. In the case of Croft *vs.* Pawlet, 2 Strange, 1109, there was the same omission and the court held, upon the authority of Hand *vs.* James, the will proved by proof of the signatures of all of the witnesses sufficently to go to the jury for them to say whether it was done in the testator's presence, and whether all the requisites of the statutes were not complied with."

And this is just exactly what the trial court did in this case. The court permitted the will to go in evidence as prima facie proof of its due execution, and afterwards submitted the question of its due execution upon the instructions offered by the appellants themselves.

The court, at the instance of the plaintiffs, instructed the jury—

> "That the law of the District of Columbia requires that a devise of real estate, that is to say, a disposition of the same by will, shall be signed by the party making the will, and that the instrument shall be attested and subscribed in the presence of such party by three or four creditable witnesses or else it shall be utterly void and of no effect. The person who subscribes a will as a witness shall be satisfied from his own knowledge of the state of the testator's mental capacity, and that he is of sound and disposing mind and capable of executing a valid deed or contract. The copy of the instrument purporting to be the will of said Thomson has been admitted in evidence upon proof of the death of John H. Cooksey and proof that the signature to the certificate on the margin of the instrument is in his handwriting; but if upon the whole evidence you should find that John H.

Cooksey, in signing the certificate, did not intend thereby to become a subscribing witness to the instrument, and that the testator did not intend that the said Cooksey should thereby become a subscribing witness thereto, or if you should find from the whole evidence that the said Cooksey did not in fact sign the said certificate in the presence of the testator, then, and in either event, the presumption of regularity in the execution arising upon the face of the certificate and proof of Cooksey's death and handwriting is rebutted, and the execution of the said instrument is not sufficient in law, and your verdict should be for the plaintiffs; and in reaching a conclusion as to the intention of the said Cooksey in the premises, it is competent for you to consider, among other facts, the position of his signature, and attach such weight thereto as in your judgment it should receive."

And this instruction, as well as the admission of the will in evidence as prima facie proof of its due execution, is fully supported by the following authorities:

Chaffee *vs.* Convention, 10 Paige, 91.
Collins et ux. *vs.* Nichols, 1 H. & J. 399.
Collins et ux. *vs.* Elliott, 1 H. & J. 1.
Welty *vs.* Welty, 8 Md. 20.
Croft *vs.* Pawlet, 2 Stran. 1109.
Dean *vs.* Heirs of Dean, 27 Vt. 749.
Bennett *vs.* Taylor, 9 Vesey, jr., 381.
Carrington *vs.* Payne, 5 Vesey, jr., 404.
Sears *vs.* Dillingham, 12 Mass. 358.
Robinson *vs.* Brewster, 140 Ill. 649.
Woodruff *vs.* Hundley, 29 So. 98.
Adams *vs.* Norris, 23 How. 523.

It is really not necessary to go outside of the decisions of the Court of Appeals, D. C., to show that a will without an attestation clause passes real estate where all of the witnesses are dead. It is only necessary to cite to this court the Holt

will case, reported in 12 Appeals, page 552. There there was no attestation clause and all of the witnesses were deceased, and the will was proved by proof of the handwriting of the deceased witnesses.

This court has applied this rule again and again to the due execution of sealed instruments, and they have held that when a subscribing witness is dead, or can not be produced, proof of his handwriting is the next best secondary evidence.

Clark *vs.* Courtney, 5 Pet. 319.
Stebbins *vs.* Duncan, 108 U. S. 32.
Hanrick *vs.* Patrick, 119 U. S. 156.

But it is said that this certificate of Cooksey is not an attestation of a will, but the certificate of a vice-consul to a paper, and an abortive attempt was made to prove by the witness, young Wier, the manner in the United States consul's office at Southampton of executing papers, etc., and it was desired to apply the answer that he would give to show the manner in which Thomson executed the will before Cooksey. The court held that testimony inadmissible as not in any way relating to what took place when the vice-consul witnessed the will of Thomson. It is well-settled law that the mere fact that a witness to a will places a certificate thereon instead of the attestation clause, or instead of merely signing it without an attestation clause, can in no way affect the efficacy of his signing the same, and that he will be considered a witness although he signed it in his official capacity and placed his certificate thereto. As said by this court, in the case of Adams *vs.* Norris, 23 Howard, p. 367, in speaking of a will signed by a public officer and witnessed by two other witnesses:

> "We comprise among the witnesses to the will Ridley, the sindico (public officer). It does not appear that the sindico was charged with any function in the preparation or execution of testaments by the law or custom of California. Nor was it clear that the

> sindico in the present instance expected to give any sanction to the instrument by his official character. He attested the execution of the will, and we can not perceive why the description of himself, which he affixes to his signature, should detract from the efficacy of that attestation."

In this case all of the witnesses were dead, and the law of California at that time required stricter formalities for the proper execution of a will than the Statute of Frauds. And the court in that case left the question as to whether or not the parties who appear to be witnesses were witnesses to be decided by the jury from all the evidence in the case just as the court in this case, upon request of the plaintiffs in error, left the question to the jury to show whether or not John H. Cooksey was a witness to the will of Thomson, and whether or not there was due execution of the will as to the said Cooksey.

See, also, the following authorities:

> Murray *vs.* Murphy, 39 Miss. 214.
> Frank *vs.* Chapman, 64 Tex. 159.
> Payne *vs.* Payne, 54 Ark. 415.

The Court of Appeals of the District of Columbia, in considering this case, after examining the assignment of errors therein, said:

> "We think that there is only one substantial question in the case for our consideration, and that is the question of sufficiency in law of the attestation of the will of William Thomson as a conveyance of real estate in this District. . . . We think that the question is solved for us by the doctrine stated by the Supreme Court of the United States in the case of Adams *vs.* Norris, 23 How. 353. The case, it is true, arose in California under the Mexican or Mexican-Spanish adaptation of the Roman civil law then in force in that part of our Union, but the rule laid down by the court is of general application."

Another contention raised against the admission of the will in evidence is that there is a discrepancy between the certified copy and the original will, in that the original will is signed by Thomson on two pages, and the certified copy does not show such signing.

In the case of Cornet *vs.* Williams, 20 Wall. 26, the certified copy had the word *sixty*-six dollars instead of *thirty*-six dollars, and the court held that that did not destroy the efficacy of the certified copy, because it was shown that thirty instead of sixty was correct, and that there was a mistake in the copy. In this case the witnesses identified the certified copy offered in evidence as being a copy of the original will. They compared it with the original at the place where the original was in custody, and they went there for the sole purpose of making the comparison, and the mere fact that there is a mistake of this kind is easily shown by an examination of the certified copy, which shows that it was not copied in two sheets as the will was originally written. Plaintiffs in error certainly waived this objection when they themselves, on page 49 of the record, offered in evidence a copy of the will of William Thomson which is identical with the copy offered in evidence by the defendants in error. The copy offered in evidence by the plaintiffs in error coming from the State Department and being a certified copy from the principal registrar of Probate, Divorce, and Admiralty Division of the High Court of Justice, and certified to by Charles J. Middleton, registrar of the court, and the fact that the said Middleton is registrar being certified to by Thomas M. Waller, consul general of the United States at London.

It is therefore contended that not only did the trial court commit no error in permitting the several witnesses, heretofore referred to, to testify, but that no error was committed in admitting in evidence the will and testament of William Thomson, jr.

We desire to call the court's attention to the fact that the

plaintiffs in error, in excepting to the admission of the certified copy of the will in evidence, objected to the same on the ground that it was not properly certified as required by law, not proven properly to be a copy of the original papers, and not proper and competent evidence of a will of real estate; that the original will should be produced, and that the alleged will had not been proven to be executed in accordance with the law of the District of Columbia so as to admit it as evidence of a will of real estate for want of proper attestation, and for the further reason that it appeared that there was a duplicate will, and that the duplicate should be produced; and that it was not shown to have been signed by said Thomson, the one purporting to have been signed by him having been signed and executed at the foot of each page; also upon the ground that the testator, at the time of executing it, was of unsound mind, and that the alleged paper was obtained by undue influence. It being the duty of the plaintiffs in error to point out to the defendants the exact ground of their exceptions, the law says that when they so point them out they can not afterward raise any other objection. In other words, if there were any other objections to the admission of this will in evidence, they can not now be raised by the plaintiffs in error, for by failing to disclose any of the objections other than that set out in the record they have waived them. As far as the objection goes to the proper proof of the contents of the instrument, they have also waived that, because they themselves offered in evidence a certified copy of the same will; so that as far as the contents of the paper are concerned it is admitted by plaintiffs in error themselves to be exactly as set out in the certified copy offered by the defendants in error. No attempt was made to offer a certified copy, although the copy offered was certified, but the certified copy offered was also an examined copy and compared by the witnesses with the original will. It was fully proven to be a copy of the original, and the original will was fully proven to have been

duly executed in accordance with the law of the District of Columbia. No evidence was offered to show that defendants had in their possession the duplicate copy, and therefore it is insisted that in their objections plaintiffs in error set up no reasons why the will should not be admitted in evidence.

Although there was no objection contained in the record to the admission of the will on the ground that we should have proved that the law of England prohibited the bringing of the will to this country, nor was there any specific assignment of error for that reason, still in the brief of the plaintiffs in error it is contended that defendants in error should have proved that the law of England prohibited the the bringing of the original will to this country. As defendants in error were never placed in a position where any such question was raised in the trial court, and as the document was out of the jurisdiction, and for that reason, under the authorities secondary evidence was permitted, the plaintiffs in error have no right to raise this contention at this time.

On the question of the plaintiffs being bound by the reasons stated in their objections, we desire to call the court's attention to the fact that it is well-settled law, as just stated, that a person is bound by the grounds of objection set up by him, and can not argue any new grounds in the appellate court. Thus the objection that the registered copy of a deed was not admissible in evidence without notice to produce the original is waived by placing the objection to its admission on other grounds at the trial, and the question of failure to give notice to produce the original can not be raised as an objection in the appellate court.

Commonwealth *vs.* Mead, 153 Mass. 284.
Gilbert *vs.* Fay, 4 App. D. C. 40.
Noonan *vs.* Caledonian Mining Co., 121 U. S. 400.
Wood *vs.* Wimer, 104 U. S. 786.
Smith *vs.* Bean, 46 Minn. 138.

Second. We now come to consider those exceptions and assignments of errors that are contained in the record and

pertain to the ruling of the court in excluding certain evidence offered by the plaintiffs in rebuttal.

And under this head we will consider the seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error. The Court of Appeals, in speaking of the contentions attempted to be raised upon these exceptions and assignments of error by the plaintiffs in error, say (Rec. p. 140):

> "As we have intimated, it would subserve no good purpose and we do not deem it necessary to enter into any elaborate consideration of the other assignments of error or of the exceptions upon which they are founded. They raise no questions of law that have not been fully settled by the authorities.
>
> "For example, to the general interrogatory appended at the conclusion of the commission sent to take the testimony of Septimus Cooksey, son of John H. Cooksey, in England, and which is the usual interrogatory in all such cases, whether the witnesses could state anything else pertinent to the issues between the parties, the witness, whose previous testimony had been addressed exclusively to the proof of his father's signature to the certificate annexed to the will, here said that he recollected the occasion when William Thomson came to see his father about his will, and that at that time, as far as the witness could judge, Thomson was perfectly sane and in good health. Exception was taken to the admission of this interrogatory and answer; but plainly the question was proper and the answer was relevant to the issue. The plaintiffs do not claim to have been surprised by either, but only to have had no opportunity for cross-examination. But no doubt the opportunity would have been afforded if application therefor had been duly made.
>
> "Similarly interrogatories were propounded to the register of the probate court in London, who had the official custody of the will of William Thomson among other wills, and he was requested to state whether it was on file in his office, whether it had been admitted to probate, whether the Cooksey certificate appeared on it, what the contents were of this

certificate, and whether a certified copy of the will which was attached to the interrogatories was a correct copy of it. To the allowance of each and all of the questions and of the answers of the witness to them exception was reserved by the plaintiffs, and these exceptions have been brought here by assignments of error thereon. But it is well settled that this is the proper mode for the proof of documents and their contents when the documents themselves are beyond the jurisdiction of the court.

"In the testimony of the plaintiffs in rebuttal it was sought to introduce testimony plainly of a hearsay character, including the certificates of the physicians for the commitment of William Thomson to the insane asylum; but insanity is not to be proved in this way, and these certificates were clearly inadmissible, especially in view of the fact that it does not appear why the testimony of the physicians themselves might not have been taken. So, also, declarations made to some of the witnesses by third parties were also excluded. And this, of course, was evidently proper. Neither in the matter of the exclusion or admission of testimony, nor in the matter of the instructions which were given or rejected, or given with a modification, do we find any reversible error. The rulings of the court were eminently right and just throughout the whole trial."

On page 28 of the record, in answer to the 15th interrogatory, the court excluded the statement of Dr. Scott, the witness attempting to recite what he said, and in answer to the 17th interrogatory the court excluded the words "as my mother would not let me go near him;" and on pages 30 and 31 of the record the court excluded the answer to the question, "Who had charge of Mr. Thomson's affairs after he was sick?" the answer reading as follows: "I telegraphed to old lady Thomson against Mr. Thomson's wishes, saying that the wolves will be here in time." It is hardly necessary to cite authorities to show that these statements that are here excluded are not admissible on the ground that they are hear-

say and purport to state, not what the witness himself knows, or not what the witness himself can testify to as of his own knowledge as to the condition of Mr. Thomson, but what some one else said to the witness or what he (the witness) said to some one else. The answer to the 34th interrogatory should also have been excluded on the ground that it was no answer at all to the question put to the witness, and the latter part of it could not be offered as a declaration of Mr. Thomson, because it does not purport that he made the statement, or if he did make such statement, it would not be admissible under any of the issues in this case, it being a well-known principle of law that declarations of the testator of undue influence, if the statement could be so construed, are not admissible to establish that fact. The refusal of the court to permit William A. P. Lane, a solicitor of the High Court of Justice of England, to testify as to the substance of a book produced in order to apparently show what was the law of England in regard to incarcerating persons in insane asylums is also alleged as error. The counsel for the plaintiffs in error offered the testimony, as he stated, for the purpose of getting in evidence the declarations of Cunningham in order to show undue influence exercised by Cunningham over William Thomson in the making of the will offered in evidence; that the declarations of Cunningham to show undue influence would not be admissible in this case is well settled by this court in the case of Ormsby *vs.* Webb, 134 U. S. 47. The trial court, however, did not rule out the testimony of the witness, but merely stated that the copy of the statute produced was an imperfect copy, and an examination of the record from pages 31 to 35 will show that the court never ruled that the witness Lane could not testify as to what the law of England was in regard to the incarceration of a person in an insane asylum. The question put to the witness was: "Now, what are the conditions of entrance of a patient—the receipt of a patient in an asylum?" And this question

was objected to on the ground that if the evidence was statutory it should be produced, and on the further ground that it is incompetent and immaterial to show how William Thomson was sent to the asylum.

Thereupon an alleged copy of the English law was produced, and the court said: "This copy does not seem to contain all that has been referred to; it is an imperfect copy," and then counsel for the plaintiffs in error went off to argue the question of the certificates and the question of undue influence, and seemed to have forgotten all about the witness on the stand, or what was the last question that was put to him. The witness was permitted to withdraw from the stand, although the court stated that if the counsel for the plaintiffs in error had any more questions to ask the witness they had better present them and let the court pass upon them.

The materiality of this evidence will be considered in considering the exception which refers to the refusal of the court to admit in evidence the copy of the application of Cunningham for the admission of Thomson to the asylum and the copies of the medical certificates attached thereto. These papers appear on pages 40 and 41 of the record. The question of their admissibility is raised in the deposition of Dr. Manning, and he was asked to produce the papers that he had—not in order to show that he had William Thomson, jr., in his asylum, which was already fully proved and not disputed, but merely to show what were the contents of the papers. Why such evicence was desired the record fails to disclose, except in the colloquy between counsel and court, on page 35, where the counsel informed the court that he desired to get these papers in evidence in order to show the undue influence of James E. Cunningham. An examination of the papers will show that they are written hearsay testimony of three persons, J. E. Cunningham, William Aitken, M. D., and George Scott, M. D., and that in the statements of the last two mentioned persons they, themselves, refer to matters that are,

as to them, mere hearsay. Upon what authority such papers are admissible in evidence counsel for the defendants in error are at a loss to understand. No authority was cited by the plaintiffs in error to sustain any such ridiculous contention. It was not contended by plaintiffs in error nor can it be contended, that these certificates which they attempted to offer in evidence establish a status, but that they are mere ex parte statements of persons who made the same without any knowledge of William Thomson, jr., and that he was by such papers incarcerated merely for the purposes of having proper care taken of him during his temporary insanity. A case directly in point is that of Leggate *vs.* Clark, 111 Mass. p. 308. In that case the question involved was the insanity of a man and whether or not he was insane at the time he, with his wife, executed a certain deed. The court held that such a deed under the statutes of that State was void and not merely voidable. And in order to prove his insanity there was admitted in evidence an order of the judge of probate committing the party to a lunatic asylum. The court, speaking of the admission of this evidence, states:

> "But we are of the opinion that the presiding judge erroneously ruled that the order of the judge of the probate committing Leggate to the insane hospital was admissible and prima facie evidence of his insanity. The question before the judge of probate was different from the issue in this case. The proceedings before him were under the statute of 1862, C. 223, section 3, which authorized judges of probate to commit to either of the State lunatic hospitals 'any insane person who, in his opinion, is a proper subject for its treatment or custody.' The issue before the jury was whether Leggate was of sufficient mental capacity to give an intelligent assent to his wife's conveyance of real estate. A man may be a proper subject for the treatment and custody of a lunatic hospital, and yet have sufficient mental capacity to make a will, to enter into contracts and transact business, and to be a witness. The order of the judge

> of probate was in a proceeding to which the tenant was not a party, and as to which he had no opportunity to be heard, and was upon an issue different from the issue on trial. The demandant contends that it is analogous to an inquisition of lunacy or a decree of a judge of probate appointing a guardian of the insane person, and therefore admissable against strangers. . . . But an order under the statute is not of this character; it does not pretend to declare the person committed to the hospital to be incapable of transacting business; it does not take from him the care and management of his estate. It affords a justification for the restraint of his person, but is is not designed to fix his status. We think the *admission of the order* of the judge of probate and the ruling as to its effect *were erroneous.*"

It has generally been held that certificates of a character like the one here offered are not admissible in evidence.

> Conyer *vs.* Boyd, 55 Ind. 166.
> Erickson *vs.* Smith, 38 How. Prac. 455.
> Shumway *vs.* Leackey, 67 Cal. 458.
> Com. *vs.* Heffner, 102 Mass. 148.
> Sewell *vs.* Sewall, 122 Mass. 156.
> Prigg *vs.* Lansburgh, 5 App. D. C. 30.
> Thomas *vs.* Ben. Co., 10 Appeals, 277.
> Snell *vs.* United States, 16 Appeals 517.
> Greenleaf on Evidence, secs. 493–498.
> State, use of Grice et al., *vs.* County, 54 Md. 426.
> Insurance Co. *vs.* Lewin, 24 Col. 43.

The next question to be considered is the refusal of the court to permit the witness Weir to answer the question—

> "Now, state whether or not, under the general form and custom of the office, Mr. Cooksey certified the papers stating that the party who acknowledged it was present when he was not present?"

This question was objected to on the ground that the witness had no knowledge whatever of Mr. Cooksey's manner of certifying papers, and also on the ground that his manner of certifying ordinary papers was immaterial to the issues here involved. The witness testified that as far as he knew the vice-consul did nothing, and that he never saw a will or deed at the office; that he saw papers, but did not know their contents, and that he never heard of anybody acknowledging a will before Mr. Thomson, nor did he ever know of any one going in and acknowledging a deed. That the papers he knew about were merely presented by people coming in for signatures, and that he was only familiar with what was done in the office of the consul, and that he was not familiar with the custom of the vice-consul signing certificates. He was asked the further question—

> "Do you know of Mr. Cooksey having signed a certificate of this character to papers without having the party signing it present?"

to which question objection was made, and the court sustained the objection because the witness had no knowledge of the contents of any of the papers that he referred to and *no knowledge* as to Cooksey signing papers. The object of this testimony was apparently to show that Mr. Cooksey was in the habit of certifying to certificates of the same character as the will of William Thomson when not in the presence of the person who signed the same. The whole evidence of the witness shows that he possessed no knowledge that qualified him to answer the question, and not having any knowledge, of course any answer that he would have given would have been mere guesswork, and the trial court was certainly right in refusing to permit this witness, who was an interested witness in the case, to testify as to the custom of Mr. Cooksey when he himself admitted that he had no knowledge of any actions of Mr. Cooksey.

3. We come now to consider the assignments of error which involve the exceptions taken to the action of the trial court in granting certain prayers of the defendants in error, and in refusing to grant certain prayers of the plaintiffs in error.

Before taking up and considering this question, we desire to call the court's attention to the fact that no exceptions whatever were noted to the charge of the court, and that after the court charged the jury in a way, we must insist, exceedingly favorable to the plaintiffs in error, the attorneys for the plaintiffs in error were so pleased with the charge that they stated in open court, before the jury, *that they had no exceptions.* They come now, however, and insist that, on account of the fact that the court read in its charge certain prayers and refused to read into his charge certain other prayers, they were injured thereby. It is a well known principle of law that the refusal and rejection of prayers by a court is never error, if the court properly charges the jury as to the law in the case; and we respectfully submit that from the standpoint of the plaintiffs in error the court stated to the jury the law as it should be stated; for, as before mentioned, their counsel arose in the presence of the jury and stated to the court *that they had no exceptions to the charge.*

The first objection is to the second prayer of the defendants in error. This prayer involves the question of estoppel. The record shows that Thomas Haig and William Thomson Weir received under the will which is here in question certain legacies and bequests, amounting in all to about $45,000. The court, by this prayer, adopts the well-known principle of estoppel, and says to them that you can not take with one hand and rob with another. This is so well established as a general principle of law that we will merely cite a few authorities on the question. The principle of law being that where a person is cognizant of the facts surrounding the making of a will, and knows his legal rights and receives a

benefit under the will, he can not attack the will unless he makes some restoration of the benefits received. The witness Weir, on the stand, admitted that he had received money under the will, and said that he was after all that he could get, and there is no offer in the pleadings or proof in the evidence to show when these persons gained knowledge of facts which cause them to try and take from their cousins this property, or that they ever tendered back what they had received. Therefore, they are estopped.

Fisher *vs.* Boyce, 81 Md. 53.
Farmington Savings Bank *vs.* Curran, 72 Conn. 342.
Watson *vs.* Watson, 128 Mass. 155.
Latrobe *vs.* Carter, 83 Md. 287.
Cunningham's Appeal, 153 Penn. St. 397.

But another and conclusive answer to this exception and assignment of error on this prayer is that the jury never had to consider the question of estoppel, because they found from the evidence there that the will was properly executed, and that there was no undue influence or testamentary incapacity, and therefore it was never necessary for them to consider the question of estoppel. If they had found the will properly executed, and undue influence or want of testamentary capacity, then it would be necessary for them to apply the principal of law here laid down. The other prayer of the defendants in error is exactly in accord with the authorities cited on the question of the admission of the will in evidence. It leaves to the jury the question of fact as to whether or not the will was duly executed, and also leaves to the jury the question of testamentary capacity and undue influence. The fourth, sixth, seventh, and eighth prayers, with the exception of the latter part of the seventh prayer, lay down well-known principles of law that are to be found in all cases involving the testamentary capacity of a devisor, or of undue influence as to the making of a will, and

it is only necessary to cite the following cases to show that these prayers contain those well-known principles:

Davis *vs.* Calvert, 5 G. & J. 173.
Barbor *vs.* Moore, 4 App. D. C. 535.
Barbor *vs.* Moore, 10 App. D. C. 30.
Olmstead *vs.* Welb., 5 App. D. C. 38.

On the motion for a new trial the only exception in regard to the prayers that was argued before the trial court was the exception taken to that part of the seventh prayer which reads as follows:

> "They are instructed that there is no evidence in this case of *any opinion* of any non-expert witness that William Thomson was, at the time he made the said will, incapable of making a valid deed or contract, nor was there any statement of any non-expert witness as to the mental incapacity of William Thomson *to make a valid deed or contract at the time said will was executed.*"

In the Court of Appeals the seventh prayer, except the part here set out, was not questioned and no objection was made thereto, nor was any objection made to the prayer as a whole, but it was insisted that the part here quoted was not supported by the evidence. No such objection appears in the bill of exceptions.

The exception in the record is a mere general exception and does not point out any reason why the prayer was not proper. Can it be contended that this court can look into the facts of the case to determine whether or not the trial court was correct in granting this prayer? The record does not contain the facts of the case, and it is insisted, upon an examination of the record as it is here, that there is no evidence of any *opinion* of non-expert witnesses, nor was there any statement of any non-expert witness as to the mental incapacity of William Thomson to make a valid *deed or contract* at the time said will was executed. The only witnesses examined by the plaintiffs in error were

the office boy and the servant, and counsel were careful not to ask either of them whether or not at the time that this will was executed William Thomson was of sound mind, or whether or not at the time of the executing of the said will *they were of the opinion that William Thomson was incapable of making a valid deed or contract.* And therefore the trial court, in granting the prayer, committed no error, but merely told the jury exactly what the facts were, and one of the counsel for the plaintiffs in error, in arguing the motion for a new trial, admitted that this statement of the court was technically correct.

In his charge the trial court qualified this prayer somewhat and cautioned the jury that it did not mean that there was no evidence in this case which it was not proper for them to take into consideration in reference to the question of whether William Thomson was not of unsound mind at the very time he executed the will. The trial court further said:

> "Evidence has been introduced of non-expert witnesses as to his condition of mind at and previous to the execution of the will, and the fact, which does not seem to be disproved at all, that he was insane before the time of the execution of the will and was taken to a private asylum and kept there for a time, disclosed by the evidence, and therefore that is competent testimony to be taken into consideration in reference to the matter."

And the court then informed the jury that he would have something further to say about that question, which he did say in the prayers of the plaintiffs in error, by permitting them to consider the question of whether or not the insanity proven in the case was permanent insanity.

Before leaving this question of the exceptions taken to defendants' prayers, we desire to call the court's attention to the fact that the plaintiffs in error contended, really without any evidence to support such contention, that there was evidence in the record of permanent insanity on the part

of William Thomson, and that this changed the burden of proof. The court, in granting the fourth prayer of the plaintiffs in error, submitted this question to the jury. In his fourth prayer, which is contained in the charge of the court, the court said:

> "If you find from the evidence that within two or three months prior to the date of said instrument, namely, February 24th, 1886, the testator was insane or of unsound and impaired mind, and not capable of making a valid deed or contract, *and that such insanity was permanent in its nature and character, the presumptions are that such unsoundness of mind continued*, and it, in such case, is upon the defendants claiming under the will to satisfy you by a preponderence of the evidence that at the time of the execution of the will he was of sound and disposing mind, capable of executing a valid deed or contract."

This would seem to have left the question of permanent insanity to the jury, and if they so find, to have changed the burden of proof.

We come now to consider the errors assigned in refusing to grant certain prayers of the plaintiffs in error, and the first one to consider is the refusal of the court to grant the fifth prayer, on page 60, and in granting in lieu thereof the fifth prayer, on page 72. An examination of the two prayers would disclose the folly of the futile attempt to thrust upon the jury any such statements as set out in the fifth prayer. The fifth prayer, as it appears to us, finds facts to exist which do not exist in the case; asks the jury to become experts in determining the question of the mental capacity of the party, and also calls the jury's attention to particular parts of the evidence which were offered, and attempts in a manner not warranted to draw a distinction between the testimony of several witnesses who testify in the case. The prayer also calls upon the court to tell the jury that persons of unsound mind even succeeded in controlling their action to such an

extent that all of their outward appearances are rational, and even their malady is not only successfully concealed from non-professional observers, but from the experienced eye of physicians. There was nothing in this case that called for such a remarkable statement for the court to make to the jury, and the court very properly instructed the jury by granting in lieu thereof the prayer number 5, on page 72.

Just why the eighth prayer was offered the record fails to disclose; whether or not there was or was not evidence tending to show the facts which it was attempted to eliminate by that prayer is nowhere disclosed by the record. The prayer was apparently offered on the part of the plaintiffs in error for the purpose, if possible, of getting out of the case what they knew to be wrongful. Indeed, on all of the testimony in this case, as it appeared in the court below, the court might well have been warranted in refusing the prayer on the ground that it was contrary to the testimony, for the court might well have thought from the testimony in the case that the whole matter was an attempted steal on the part of the plaintiffs in error and might have refused the prayer on that ground. The record not disclosing the whole evidence in the case, it would be utterly impossible for this court to find error in the ruling of the court below, for it might also have been refused on the ground that there was no testimony to support.

An examination of the charge of the court will disclose the fact that this case was submitted to the jury in a way most favorable to the contentions of the plaintiffs in error and an examination of the charge will show that no error of law was committed by the court, and that no error of law was alleged by the plaintiffs in error to have been committed by the court in submitting the case to the jury. It is a well-known principle of law that even if plaintiffs in error had excepted to the charge, in their exceptions they would have to point out to the court the errors in the charge; and a mere statement on

their part that they excepted to so much of the charge as was at variance with the prayers requested by them would be too vague and general to entitle them to a consideration of such exception in an appellate court. How, then, can the plaintiffs in error ask the court to consider the alleged exceptions taken by them to certain prayers when they have acquiesced in the charge and not attempted to allege any error therein, but, as stated to the court in the presence of the jury, they have no exceptions to such charge. If a party can not reserve his rights by objecting to so much of the charge as is at variance with the prayers requested by him, how can he claim a right to criticise prayers refused or granted when he fails in any way to criticise the charge or to set up any specific objections to the prayers refused or granted.

Beaver *vs.* Taylor et al., 93 U. S. 55.

Another principle of law is well settled, that all instructions must be taken together, and if when taken together in the charge they properly state the law, an exception to one would be of no value.

District of Columbia *vs.* Haller, 4 App. D. C. 405.

Again, nothing is better settled than it is in the discretion of the court to refuse all instructions prayed for by either party and to state the law in its own language, and if it does so and states properly the law of the case, then no error can be assigned for not granting or refusing particular prayers.

Carpenter *vs.* Railroad Co., 3 Mack. 225.
Jackson *vs.* Railroad Co., 6 Mack. 232.
District of Columbia *vs.* Wilcox, 4 App. D. C. 90.
Travers *vs.* United States, 6 App. D. C. 450.
Rio Grande R. R. Co. *vs.* Leak, 163 U. S. 280.

While not desiring to be over technical in considering the record in this case, we feel it our duty to call the court's attention to the fact that with the exception of one or two exceptions taken in this record, there is absolutely no ground given or reasons stated why the plaintiffs in error except, and we know of no principle of law better settled than that when exceptions are reserved to the rulings of the trial court on the evidence or prayers looking to a review of such rulings on writ of error, there should be such a statement in the bill of exceptions as is necessary to make intelligible the point or decision wherein the court is supposed to have erred, and nothing should be left to surmise and conjecture; and where the bill of exceptions fails to show the grounds upon which the counsel contend the court erred in its rulings, or to point out to the court wherein there is error, the matter can not be reviewed on writ of error.

Moore *vs.* Bank of Metropolis, 13 Peters, 302.
Northern Pac. R. R. *vs.* Charles, 51 Fed. Rep. 362.
De Forrest *vs.* United States, 11 App. D. C. 458.
Milliken *vs.* Mand, 110 Ala. 332.
Young *vs.* Martin, 8 Wallace, 354.
Insurance Co. *vs.* Lea, 21 Wall. 158.
District of Columbia *vs.* Woodbury, 136 U. S. 450.
Woodbury *vs.* District of Columbia, 3 Mackey, 127.
Prindle *vs.* Campbell, 18 D. C. 598.
Hazleton *vs.* Le Duc, 10 App. D. C. 381.
Noonan *vs.* Caledonian Co., 121 U. S. 400.
Bell *vs.* Sheridan, 21 D. C. 370.

The record from pages 73 to 130 shows certain proceedings had in an attempt to obtain a new trial. While this question was argued in the Court of Appeals, no error was assigned on this ground, the plaintiffs in error no doubt conceding the law to be that this court never inquires into the question of whether or not the lower court erred in refusing or granting a new trial, and therefore do not wish to

argue the question before this court. We desire, however, to call the court's attention to the affidavits therein set out, in order to show to what length plaintiffs in error have gone in this case to try to defeat the defendants in error. The bad faith of the plaintiffs in error in attempting to argue to the Court of Appeals and to this court that the will set out in the bill of exceptions, as well as the certificate of Cooksey, is not the will and certificate referred to in the depositions taken by the defendants in error, compels us to refer to these affidavits. These affidavits, as well as the contention of the plaintiffs in error in regard to the exhibits accompanying the deposition, certainly show that plaintiffs in error have no merit whatever in their case, but are attempting, by means fair or foul, to rob the defendants in error of their verdict and judgment.

It is to be noted on page 130 that the charge of the court and the remarks made by counsel at the end thereof were inserted in the bill of exceptions at the request of the defendants and over the objection of the plaintiffs. In defense of our requiring the charge of the court and the statement of counsel at the end thereto, we desire to say that we only ask this court to hear the questions of law as they were heard in the trial court; that we have nothing to conceal, nothing to keep out of the record, but we believe that it would be unheard of to bring this case here with the general objections of the plaintiffs in error to the prayers as contained in this record and leave out the charge of the trial court. In fact, we are aware of no practice that would warrant any such proceedings.

We respectfully submit that the record shows no error and that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

WILTON J. LAMBERT,
D. W. BAKER,
Attorneys for Defendants in Error.

Supreme Court of the United States.

No. 55.—October Term, 1904.

Andrew C. Keely, Trustee, et al., Plaintiffs in Error,
vs.
Joseph H. Moore et al.

In error to the Court of Appeals of the District of Columbia.

[December 19, 1904.]

This was an action of ejectment brought in the Supreme Court of the District by grantees of the heirs at law of William Thomson against Joseph H. Moore and the firm of Thomas J. Fisher & Company, agents of Mary Cecelia and Georgiana Hawkes Thomson of the county of Kent, England, devisees under the will of William Thomson, to recover possession of an undivided ninety-one one hundredths of certain real estate in the city of Washington. Upon the trial it was admitted that William Thomson died in Southampton, England, in 1887, seized of the lot in question; that he was born in and was a citizen of the United States, leaving no issue or descendants. Plaintiffs had acquired the title of the heirs at law, and the defendants were in possession of the lot as life tenants under his alleged will.

The validity of the will and the due execution thereof were contested by the plaintiffs for reasons hereinafter indicated in the opinion. The trial resulted in a verdict for the defendants, upon which judgment was entered, and affirmed by the Court of Appeals. (22 Apps. D. C. 9.)

Mr. Justice Brown delivered the opinion of the Court.

The validity of the will was attacked upon three grounds: 1st, that it has not the requisite number of witnesses to pass real estate in this District; 2d, that the testator was of unsound mind; 3d, that undue influence had been exercised by one of the designated executors, and others.

Thomson was a resident of Washington, but at the time of and for some years prior to his death was the American consul at Southampton, England. One John H. Cooksey, a resident merchant at Southampton, was his vice consul. The will was prepared by Walter R. Lomer, a resident solicitor, and was executed at his office February 24, 1866. By this will he devised the property in controversy to the appellees, Mary Cecelia Thomson and Georgiana Hawkes Thomson, his cousins, of Kent County, England, jointly for their joint lives, and to the survivor of them, with remainder to Mary Cunningham Roberts, of London, for life, and remain-

der in fee to her only son. The will, which was executed in duplicate, was written upon two sheets of paper, to each of which the testator affixed his name. It was witnessed in the usual form by Lomer and by one Linthorne, a clerk in his office, who attached their signatures in the presence of and at the request of the testator, and in the presence of each other. On the day after the execution of the will Thomson again went to the office of his solicitor, Lomer, who wrote a certificate of acknowledgment in the margin of the second and last page of the will, which was signed by Cooksey, the vice consul.

The original will, being of record in the Probate and Admiralty Division of the High Court of Justice in London, could not be produced, but was proved by a certificate and examined copy. The attestation clause and the certificate were as follows:

"Signed and acknowledged by the said William Thomson, the testator as and for his last will and testament in the presence of us, both being present at the same time, who at his request in his presence, and in the presence of each other have hereunto subscribed our names as witnesses.

WALTER R. LOMER,
Solicitor, Southampton, Eng.
R. ROUPE LINTHORNE,
His Articled Clerk.

"I hereby certify that William Thomson, consul at Southampton for the United States of America, attended before me this 25th day of February 1886 and acknowledged the foregoing paper-writing contained in two sheets of paper as, his last will and testament and that the signature 'Wm. Thompson' at the foot thereof is in the proper handwriting of the said William Thomson.

[SEAL U. S. CONSUL.] JOHN H. COOKSEY,
Vice Consul United States of America."

The execution of the will was proved by the two subscribing witnesses, Lomer and Linthorne, and the certificate by proof of the death of Cooksey, and the genuineness of his signature. This was proper. (*Clarke's Lessee* v. *Courtney*, 5 Pet. 319; *Stebbins* v. *Duncan*, 108 U. S. 32.) At this time there was in force in this District the fifth section of the act of 29 Charles II, chapter 3, which had been adopted in Maryland in 1798, and carried into this District as section 4, chapter 70, of the Compiled Statutes of 1894. It provided as follows: "All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect."

The object of the certificate in question is not entirely clear, though from the fact that Thomson took the will away with him after its execution, and stated that he would attend before the consul general at London and obtain

the requisite certificate, it would seem that he thought the certificate was necessary to the proof of the will in another country. He did not go to London, however, but called again at Mr. Lomer's office, with the request that he prepare the requisite certificate, which he afterwards procured Mr. Cooksey to sign. The certificate was not offered as proof that the will was a copy of the original, since it was annexed to the original, and we can consider it only as proof as to what it contains. It certifies, in substance, that the testator attended before Cooksey upon the day following the date of the will, acknowledged it to be his last will and testament and that the signature is genuine. Whether he intended to certify that Thomson acknowledged his signature to be genuine, or that he, Cooksey, certified that it was genuine, is somewhat uncertain; but if the words "Vice Consul of the United States of America," which are merely superfluous, were omitted, there would be no failure to comply with the statute, unless in the omission to certify that Cooksey, the certifying officer, "attested and subscribed in the presence of the said devisor." But as it appears that Thomson, not knowing when he would be in London, took the certificate to the vice consul, and that the latter signed it, the jury might properly draw the conclusion that it was signed in the testator's presence. This would be the usual course of business, and the presumption is that Cooksey conformed to it and to his duty as a certifying officer.

The certificate was probably prepared under the belief that wills, like deeds, made in a foreign country must be executed and acknowledged before some foreign official, or "before any (some) secretary of legation or consular officer of the United States," (R. S. section 1750; Compiled Statutes D. C. chapter 58, section 6;) but as such certificate was unofficial and contributes nothing as such to the validity of the will, it can only be looked upon as the affirmation of an ordinary witness to the facts therein stated. No particular form of attestation was necessary, as appears to be the case in England and in several of the United States, and if the certificate of Cooksey had been written at the foot of the will and signed by himself and by the two witnesses, Lomer and Linthorne, it would have been a sufficient attestation. How, then, can it be regarded as insufficient when an attestation in one form is signed by two witnesses and an attestation in another form by a third? Bearing in mind that the certificate, if given any force at all, must be considered an attestation, we do not think that the fact that it may have been written and signed under a mistaken impression as to its necessity and purpose vitiates it as an attestation. What use was intended to be made of it is immaterial, if it were useless for any purpose as an official certificate. The facts certified are appropriate to the attestation of the instrument, and, if true, we see no reason for holding it to be invalid as an attestation, because it was signed under the impression that it was necessary for some possible purpose as a certificate.

The case of *Adams* v. *Norris*, (23 How. 353,) is much in point. This was an action of ejectment for a parcel of land in California. Plaintiffs claimed through the heirs at law of one Grimes; defendants through the devisees in his will. The law required three witnesses to the validity of the will. Two of the witnesses signed in the usual manner, but above their signatures and beneath that of the testator was written "Before me, in the absence of the two alcaldes, Roberto T. Ridley, Sindico." The sindico was counted among the witnesses, the court saying: "We comprise among the witnesses to the will, Ridley, the sindico. It does not appear that a sindico was charged with any function in the preparation or execution of *testaments by the law* or custom of California. Nor is it clear that the sindico in the present instance expected to give any sanction to the instrument by his official character. He attests the execution of the will, and we cannot perceive why the description of himself, which he affixes to his signature, should detract from the efficacy of that attestation." As it did not appear that the sindico or the two alcaldes were charged with any special duties, it was practically held that the certificate of acknowledgment, and the official character of the sindico, might be disregarded, and the signature treated as an attestation.

In the case of *Clarke* v. *Turton*, (11 Ves. Jr. 240,) the will was executed abroad. It appears that three witnesses were required, apparently under the same act of Charles II as in this case. The third signature was, as in this case, that of the vice consul, whose attestation was considered necessary to the validity of the act. The case is insufficiently reported, but the court held that the attestation was a memorandum of the vice consul, to operate as a certificate, "a separate act in his public character, and sealed with his official seal; and therefore it could not be said he subscribed as a witness." The question upon that point was sent to law, but it does not appear what disposition was made of it. It appears that the certificate was an official act, and treated as necessary, but the report fails to show what it contained, and in the absence of such showing the case is of little value.

The applicability, and to some extent the authority of this case, is somewhat weakened by that of *Griffiths* v. *Griffiths*, (L. R. 2 P. & M. 300.) The will was signed by the testator in the presence of two witnesses, who signed their names in his presence—one opposite the word "Executors" and the other opposite the word "Witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name *in that character*. Lord Penzance held that such person did not sign the will exclusively as executor, but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the will was valid. Somewhat to the same effect is *Pollock* v. *Cassell*, (2 Gratt. 439.)

Conceding the general rule to be that witnesses must intend to attest the will *as witnesses*, the inference is strong that Cooksey did so in this case, as he certifies to the genuineness of the signature of Thomson and to the acknowledgment of the will in his presence; and these are what would have been required by the law of this District had the instrument been a deed. It is argued that Cooksey did not intend to attest the will, but merely to sign the certificate; but the certificate of what? Only the fact that the will was acknowledged in his presence and that the signature was genuine. This is precisely the object of an attestation, and as an attestation we think it must be regarded. He may have supposed his official certificate of acknowledgment necessary to the execution of a will in a foreign country, but as he did certify personally to such acknowledgment the addition of his official title adds nothing to and takes nothing from the weight of his attestation. We must conclude that he intended to certify exactly what he did certify, and we are giving it exactly the effect he intended to give it.

If the certificate were an official act and material as a separate acknowledgment of the execution of the will, as in the acknowledgment of a deed, the case would be different, since it has never been supposed that a notary, who takes an acknowledgment of a deed, could be counted as a witness to the deed without a separate signature. But here the certificate was a wholly unofficial act, and we see no objection to disregarding the words "Vice Consul of the United States," and treating it as an acknowledgment of the execution before a competent witness. The acknowledgment of a will is really a feature of the attestation. The statute did not require that the devisor should sign the will in the presence of the witness, but that the witness should sign in the presence of the testator.

2. The evidence of Thomson's insanity was quite unsatisfactory. It appears that during the autumn or early winter of 1885 he was seized with an acute mania, and on December 15 was committed to a private insane asylum as a lunatic, upon the certificate of two physicians, and at the request of a cousin named James E. Cunningham, a merchant of London, who appears to have taken temporary management of his affairs. He remained in the asylum about six weeks, and on February 1, 1886, somewhat more than three weeks before he executed his will, was discharged as probably cured—in reality granted a leave of absence on probation. The belief in his cure being justified by his subsequent conduct, a formal order of discharge was entered on the record of the asylum on June 26, 1886. Lomer and Linthorne, the witnesses who were present at the execution of the will, and Septimus Cooksey, the son of the vice consul, all testified to the mental capacity of the testator at that time.

In this connection exception was taken to the exclusion of the application of James E. Cunningham for the admission of Thomson to the insane

asylum, and of the certificate of the two physicians as to his insanity. These were properly excluded, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. Thomson may have been insane to the extent of being dangerous if set at liberty, and yet may have had sufficient mental capacity to make a will, to enter into contracts, transact business and be a witness. In the case of *Leggate* v. *Clark*, (111 Mass. 308,) the admission of similar testimony was treated as error. In addition to this, however, these certificates were both dated December 14, 1885, more than two months before the will was made, and are by no means inconsistent with the other testimony that he was released from the asylum as cured February 1, 1886, and that three weeks after that, when he executed the will, he appeared to be of sound and disposing mind and memory.

In addition to the proof of his commitment to the asylum, and of his undoubted insanity prior and for some time subsequent thereto, there was slight evidence of insane acts during the month of February, though there was no opinion expressed by any one that he was incapable of making a valid deed or contract. The whole testimony regarding his insanity was duly submitted to the jury, who were instructed that if they found his insanity to be permanent in its nature and character, the presumptions were that it would continue, and the burden was upon the defendant to satisfy the jury by a preponderance of testimony that he was at the time of executing the will of sound mind. There was no error in this instruction.

There were also a large number of exceptions taken to the admission or exclusion of testimony and to the charge of the court, but to consider them in detail would subserve no useful purpose. We have examined them carefully, and have come to the conclusion that there was no ruling of the court of which the plaintiffs were entitled to complain. The evidence of insanity was very slight, and there was no legal testimony to show that the will was executed under the pressure of an undue influence.

The judgment of the Court of Appeals is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.